



SDSU LIBRARY - BROOKINGS, SD



3 1574 00542 1059

HE2757

1930

E5

c.2

27297

**SOUTH DAKOTA STATE UNIVERSITY
LIBRARY
Brookings, SD**

THE GOVERNMENT AND RAILROAD TRANSPORTATION

BY

ALBERT RUSSELL ELLINGWOOD, B.C.L. (OXON.), PH.D.

ASSOCIATE PROFESSOR OF POLITICAL SCIENCE IN NORTHWESTERN UNIVERSITY

AND

WHITNEY COOMBS, PH.D.

PROFESSOR OF ECONOMICS IN ST. LAWRENCE UNIVERSITY



GINN AND COMPANY

BOSTON • NEW YORK • CHICAGO • LONDON
ATLANTA • DALLAS • COLUMBUS • SAN FRANCISCO

HE 2757

1930

E5

c. 2

COPYRIGHT, 1930, BY ALBERT RUSSELL ELLINGWOOD AND WHITNEY COOMBS
ALL RIGHTS RESERVED

PRINTED IN THE UNITED STATES OF AMERICA

630.1

Ref

21297.

Ec
3.12

The Athenæum Press
GINN AND COMPANY · PRO-
PRIETORS · BOSTON · U.S.A.

CONTENTS

	PAGE
INTRODUCTION	vii
Cross References to the 1929 Edition of the Interstate Commerce Act	xiii
Table of Cases Quoted	xv
 I. WHAT IS INTERSTATE COMMERCE?	 1
A. Of what does Commerce Consist	1
B. When does Commerce begin or cease to be Interstate	6
C. Interstate Commerce within the Meaning of the Interstate Commerce Act as Amended	13
 II. RELATIVE POWERS OF FEDERAL AND STATE GOVERNMENTS IN REGULATION OF COMMERCE	 15
A. Power given exclusively to the Federal Government	15
B. Power exercised by the States subject to Subsequent Action by the Federal Government	19
C. Power given exclusively to the States	35
 III. STATE REGULATION	 46
 IV. FEDERAL REGULATION	 67
A. Economic and Political Causes	67
B. Organization and Procedure of the Interstate Commerce Com- mission	76
1. Composition of the Commission	76
2. General Jurisdiction and Procedure	77
a. The Institution and Procedure of Investigations by the Commission	77
b. Reports and Orders resulting from the Commission's Inves- tigations	78
3. Power to obtain Testimony	82
4. Reports and Accounting	96
C. General Duties of Carriers subject to the Interstate Commerce Act	106

iv GOVERNMENT AND RAILROAD TRANSPORTATION

	PAGE
D. The Commission and the Courts	107
E. Penalties and Remedies (General)	115
1. Civil Liability of Carriers	115
2. Penalties for Violations of the Act (General)	125
3. Mandamus to compel Compliance with the Act	126
4. Enforcement of Orders of the Interstate Commerce Commission	126
a. Orders for the Payment of Money	126
b. Orders other than for the Payment of Money	127
5. Statute of Limitations	128
6. Commission's Records, Reports, and Decisions as Evidence	128
7. Parties to Proceedings under Interstate Commerce Acts	129
8. Expediting Act	129
9. Embezzlement of Funds of Common Carrier	129
F. Railroad Finance	129
1. Valuation	129
a. General Value under the Valuation Act	129
b. Value for Rate-making Purposes	149
2. Issue of New Securities	182
G. Unjust Discrimination Forbidden	195
1. Acts Prohibited	195
a. Discrimination in Charges to Persons for Like Service	195
b. Undue Preference in Favor of any Person, Firm, Locality, or Kind of Traffic	200
2. Penalties	219
H. Long and Short Haul Principle	224
1. Interstate Commerce Act	224
2. Mann-Elkins Act	234
3. Act of 1920	244
I. Rate Fixing	267
1. Unjust Discrimination Forbidden	267
2. Rates must be Just and Reasonable	268
a. Interstate Commerce Commission has no Rate-making Power under this Provision	268

CONTENTS

v

	PAGE
<i>b.</i> Who determines Reasonableness of Rates?	275
<i>c.</i> Standards of Reasonableness	278
<i>d.</i> Exchange of Services	281
3. Publicity of Rates	282
4. Stability of Rates	283
5. Observance of Rates	284
6. Interstate Commerce Commission given Power to prescribe Maximum Rates (1906) and Reasonable Classifications (1910)	287
7. Interstate Commerce Commission given Power to Suspend Rates	291
8. Control of Rates for Transportation by Rail and Water . .	292
9. Under the Transportation Act of 1920	297
<i>a.</i> Scope of the Commission's Power to fix Rates	297
(1) In General	297
(2) As to Rates imposed by State Authority	331
<i>b.</i> Basis upon which Rate Fixing is to Rest	346
<i>c.</i> Disposition of Excess Returns	362
(1) The "Recapture" Clauses	362
(2) The Reserve Fund	371
(3) The General Railroad Contingent Fund	371
10. Transportation Free or at Reduced Rates	373
<i>a.</i> General Provisions	373
<i>b.</i> Mileage, Excursion, and Commutation Tickets	377
<i>c.</i> Special Rates on Imports and Exports	399
11. Rate Structure Investigation	408
<i>J.</i> Economic Bases of Rate Fixing	411
1. Cost of Service	412
2. Value of Service	430
<i>a.</i> Class and Commodity Rates	430
<i>b.</i> What the Traffic will Bear	445
3. Competition	457
<i>a.</i> Carrier Competition	457
<i>b.</i> Market Competition	465
<i>c.</i> Commodity Competition	479

vi GOVERNMENT AND RAILROAD TRANSPORTATION

	PAGE
K. Regulation of Facilities	483
1. Car Service	483
2. Use of Terminals	496
3. Construction or Abandonment of Lines	500
4. Establishment of Connections with Water Carriers	509
5. Switch Connections	514
L. Regulation of Monopolistic Tendency in Railroads	519
1. Pooling	520
a. Interstate Commerce Act of 1887	520
b. Transportation Act	522
2. Purchase of Stock or Leasing of One Railroad by Another	527
3. Operation of Competing Steamship Lines	555
4. Interlocking Directorates	564
5. Transactions with Corporations or Firms having the Same Officers	568
6. Commodities Clause	574
M. Consolidation	582
N. Regulation of Safety and Health	593
1. Regulation applying to Equipment	593
2. Regulations limiting the Working Hours of Employees	603
3. Regulation of the Carriage of Dangerous Articles	607
4. Reporting of Accidents	608
O. Federal Legislation relating to Railway Labor Disputes	608
1. The Act of 1888	608
2. The Erdman Act	609
3. The Newlands Act	610
4. The Railroad Labor Board	616
5. The Railway Labor Act	620
P. Regulation of Common Carriers by Water in Foreign Commerce	624
Q. Inland Waterways Transportation	628
R. Miscellaneous Provisions of the Interstate Commerce Act	636
1. Routing of Shipments	636
2. Disclosure of Information as to Shipments	636
INDEX	637

INTRODUCTION

This book is designed for use either as collateral reading in connection with a text of the orthodox type or as a text for studying by the case method the subject of the governmental regulation of the railroads. This method is at its best in the study of governmental operations. The student approaches the subject through the original sources and builds up his knowledge inductively from first-hand observation. He reads for himself the statutory provisions which deal with a particular situation and, by analysis, meditation, and simplification, builds up his conception of their meaning. In his hands are placed administrative reports which summarize the operations directed by the statutes, and which give him a measure of their effectiveness. He distills administrative decisions and finds the statutes more meaningful as the process of application goes on before his eyes. He wrestles with court opinions which settle beyond argument the construction to be given to the words of the legislature. Thus, instead of being dependent upon an intermediate expositor, he comes face to face with the actual records, the governmental action itself, much as the modern student of the natural sciences views the phenomena in which he is interested.

It is evident that the differences in form, content, and purpose between a collection of selected source material of this character and the orthodox didactic text will necessitate a different technique of study; hence a few suggestions as to the method of preparing assignments may be helpful.

THE TEXTUAL MATERIAL

1. *Statutory provisions.* At the beginning of each section reference is made to any statutory provisions that are relevant to the topic about to be considered. Nearly all these are contained in the pamphlet entitled "The Interstate Commerce Act as Amended" (including text or related sections of other acts), published by the Interstate Commerce Commission from time to time and obtainable from the Superintendent of Documents for a nominal sum. To economize space in the present

text, it will be assumed that each student will provide himself with a copy of this pamphlet; it will be referred to throughout as the I. C. Act (the page references are to the 1926 edition). Amendments or new statutes enacted since the publication of the 1926 edition (up to March 3, 1929) are described in the editors' note¹ at the head of each section or, if necessary, reprinted in full. Statutes may be complex, repetitious, ponderous, involved, and obscure. The student must extract the meaning and picture the provisions in operation. It is often helpful to write out a paraphrase restating the statute in as simple and direct terms as possible, and before proceeding to the administrative or judicial interpretation it is highly desirable to evolve an independent interpretative commentary setting forth the construction to be given to the statute.

2. *Judicial and administrative decisions.* Regulatory laws are usually applied in the first instance by administrative officials. If the person affected thinks the law has been misapplied or misinterpreted by these officials or that the law itself is repugnant to the Constitution, he may take the case to the appropriate court and ask it to correct or restrain or set aside the administrative action. Thus it is from judicial decisions that we derive our authoritative information as to the extent of the regulation permitted by the Constitution (state or Federal, as the case may be) and as to the meaning of legislative enactments. Furthermore, in the case of such a highly specialized field of regulation as railroad transportation it has been found advisable to set up administrative commissions composed of men well qualified by knowledge and experience to deal with the difficult technical questions presented by the impact of the regulatory system upon carriers and patrons. Commonly such a commission is more than a merely administrative body performing routine functions in a cut-and-dried manner, making investigations, granting permits, and issuing rules and regulations: it is also a quasi-judicial body before which passengers, shippers, railroads, or others who have complaints founded upon the regulatory statutes relating to common carriers appear to make claims for compensation, to enter objections to acts or policies prejudicial to their rights, and in general to seek any relief they may be entitled to under the statutes. In all such cases the Commission is usually required to follow a procedure which is judicial in character: the parties are represented by counsel, evidence is taken, and a decision (often supported by a reasoned opinion) is made.

¹ Throughout the book the editors' notes are inclosed in brackets.

From the foregoing explanation it will be clear why most of the material in this book consists of cases decided by the Supreme Court or the Interstate Commerce Commission. To save the student's time, the opinions are edited by the excision of matter either unimportant or irrelevant to the principal questions under discussion, and of details unnecessary for present purposes. In structure and style the opinions of the Commission are sufficiently similar to those of the courts so that the same method of study can be used for both. The only satisfactory method of preparing a case for discussion in the classroom is to prepare a "digest," which differentiates the steps or stages in the progress of the case, simplifies its reasoning, and emphasizes its significant results. All the items in a fully rounded-out digest cannot always be obtained, even from the original report of the case, but they are here described so that the student may in each instance aim at as complete a digest as possible:

a. The name of the case and the citation. This should include the name of the court which rendered the decision under examination, the date of the decision, and the volume and page of the original report where the opinion appears.

b. The facts. Often many of the facts introduced into the record by the parties are not necessary, in view of the grounds on which the court rests its decision, and may be left out of the student's statement of facts. Nor should the statement go into greater detail than is necessary to make clear the argument of the opinion. Findings of fact made by a lower tribunal should be included here. In many of the following cases, when the opinion itself does not contain a concise statement of the facts, the editors have supplied their own statement at the beginning of the report.

c. Proceedings in the lower courts. Most cases start in an inferior tribunal which has the double task of ascertaining the facts (where they are in dispute) and applying the law to them when they are found. The findings of fact of this trial court are usually final, but either party may take the case to a higher court to correct the decision of the trial court upon issues of law if, in the opinion of the appellant, it was erroneous. The portion of the digest dealing with the proceedings in lower courts should describe briefly the form of action, the pleadings, the issues of law, and the decision.

d. Proceedings in the superior court. This is the portion of the digest which is of greatest importance to the student and the preparation of which will require the most time and care. It includes the following

items. The first item is the *form of appeal*; the second, the *issue* (or *issues*) of law. An issue is a difference of opinion, usually upon a proposition not positively and unequivocally established by earlier decisions of the court. It is best to state it in the form of a question, such as "Has Congress the power, under the Interstate-Commerce clause, to do so-and-so?" or, "Is a law which does so-and-so repugnant to the due-process clause?" or, "Has the Interstate Commerce Commission power under a certain clause of a statute to do so-and-so?" It must be a question the answer to which will decide the case, but must not be broader in its scope than is necessary to decide the case. It should be a fully rounded and explicit question that will stand by itself, intelligible to one who has not read the case, yet phrased with the utmost succinctness. Finally, the question should be capable of direct answer with a simple affirmative or negative. The reasons for these exacting requirements will be more apparent when we come to consider the "rule" of the case. The third item is the *decision*. This can almost always be stated in a word or two: "affirmed," "reversed," and so on. The fourth item is the *ratio decidendi*, or, more shortly, the *ratio*. This is the term given by the lawyer to the argument by which the court justifies and explains the conclusion it reaches. Generally it is the lengthiest part of the digest. It will be found very helpful, especially in long opinions, to throw the argument into outline form so that the main steps in the reasoning will stand out conspicuously and the subordinate supporting arguments will be properly distributed. The fifth item is the *rule* (or *rules*) of the case. There will be a rule corresponding to each issue. If the issue has been properly stated, the rule will be merely an affirmation or denial of the issue; for example, "Congress has not the power, under the Interstate Commerce clause, to do so-and-so," or, "A law which does so-and-so is repugnant to the due-process clause." In a word, the rule of the case is the precise statement of the principle of law which is both necessary and sufficient to decide the case. But although it must go far enough to be sufficient, it must not go farther than is necessary. The student will constantly be tempted to generalize, and the growth of one's knowledge, as well as the development of the law itself, may be found in judicious generalization. But there are two risks involved in the process: (1) the rule may be stretched out over cases to which the courts will later refuse to extend it because of elements which "distinguish" them from the principal case; (2) it may be so generalized as to become a truism about which there can be no dispute, but the application

of which to particular cases is as difficult as before the principal case was decided. The court itself will sometimes state its conclusions in broader terms than the case requires, and in so far as these conclusions exceed the bounds of the issues in the particular case, they are not regarded as binding upon the same or other courts in later cases, but may be ignored as *obiter dicta*.

3. *Administrative reports.* A number of administrative reports are included in the text, either to make clear the method of application of the statutes or to supply the student with a record of achievement by which some estimate of the success or failure of the legislative policy may be made. When these are prepared, the information contained in them should be condensed, tabulated if possible, and summarized, and any critical conclusions that can be deduced therefrom should be definitely formulated.

4. *Committee reports.* Several reports of legislative committees will be found in the text. Though not case material in the narrowest sense, they are included because of the light they throw on the conditions that were responsible for certain regulatory measures, and on the legislative understanding of the meaning of particular statutes. The student should be reminded, however, that the opinions of such committees do not bind the executive or judicial organs of the government, and may prove to be quite at variance with the authoritative construction ultimately evolved.

5. *Other material.* In a few sections there is some secondary material taken from treatises or periodical literature, where it did not seem feasible to deal with the topic adequately by selections from primary sources without exceeding reasonable space limits.

QUESTIONS

Many of the cases included in the present selection are important milestones in the development of the governmental regulation of transportation in this country. They are "leading cases"—direction posts from which long highways have unrolled. It is particularly important that their basic principles be thoroughly examined and their implications understood. Many cases may be considered as expositions of general formulas, which are best mastered by practice in application to concrete problems; others may be thought of as the center of a web or network, the pattern of which can be discovered only by following out the various ramifications. Particularly if the case method is used,

it is of the utmost importance that the information derived from the selected original material be turned over, analyzed, criticized, elaborated, and expanded by extensive and well-guided class discussion. The lists of questions at the end of each case or section are intended to facilitate this process. They are of different kinds and serve different purposes. (1) Some are critical questions relating directly to the statute or case under consideration, and are designed to help the student to a better understanding of the provisions of the law or the argument of the case or to call his attention to weaknesses in the latter. (2) Others are intended to give a larger meaning to the case by suggesting permissible generalizations of its rule and pointing out its implications and extensions. (3) Still others encourage the student to elaborate the background of the case and orient it in its legal and economic setting. (4) There are questions of policy, bearing upon the economic, social, or political desirability of statutory provisions or rules enunciated by the courts. (5) Finally, there are many problems stated for decision. Some are actual cases; some are fictitious. The student is not expected to seek supporting authority for his decision of these cases. Indeed, in many instances there has as yet been no adjudication of the point raised, and the case has been fabricated merely to show the possibilities inherent in a situation or to develop the firmer grip upon principles which comes from repeated application of a rule to more or less similar facts. On the other hand, in dealing with questions of the type described in (3) and (4), it will often be necessary for the student to seek information in various other sources if he is to reach an informed and intelligent opinion.

CROSS REFERENCES TO THE 1929 EDITION OF THE INTERSTATE COMMERCE ACT

SECTION OF THIS BOOK	PAGE OF THIS BOOK	ACT	SECTIONS OF THE ACT	PAGES OF 1929 EDITION OF THE INTERSTATE COMMERCE ACT
I, C	13	Interstate Com.	1 (1-3)	1-3
IV, B, 1	76	Interstate Com.	11, 18, 24	32-33, 57-58, 79
IV, B, 2, a	77	Interstate Com.	12	33-35
			13 (1, 2)	35-36
			14	37-38
			16 (5-7, 11)	54
			16a	55-56
			17, 19	56-57, 58
			20 (10)	67
IV, B, 2, b	78	Interstate Com.	21, 12 (1)	75, 33-34
		June 18, 1910	6 (2)	83
IV, B, 3	82	Interstate Com.	12	33-35
		Compulsory Test.	All	96-97
		Immunity of Wit.	All	97-98
		Elkins	3 part	95
IV, B, 4	96	Interstate Com.	20 (1-8)	63-67
IV, C	106	Interstate Com.	1 (4, 6)	3, 4
IV, D	107	Dist. Ct. Juris.	All	98-105
		Expediting	All	105-106
IV, E, 1	115	Interstate Com.	8, 9, 20 (11, 12)	29-30, 67-70
			22 (1) part	75-76
IV, E, 2	125	Interstate Com.	10 (1) part	30
			16 (8-10)	54
		Elkins	1 (1, 2) part	91-92, 93
IV, E, 3	126	Interstate Com.	20 (9), 23	67, 78
IV, E, 4, a	126	Interstate Com.	16 (1, 2, 4)	51-52, 53
IV, E, 4, b	127	Interstate Com.	16 (12)	54-55
IV, E, 5	128	Interstate Com.	16 (3)	52-53
IV, E, 6	128	Interstate Com.	14 (3), 16 (13)	38, 55
IV, E, 7	129	Interstate Com.	13 (1, 2) part	35-36
		Interstate Com.	16 (4)	53
		Elkins	2	94
IV, E, 8	129	Elkins	3	94-95
IV, E, 9	129	Clayton	9	158-159
IV, F, 1, a	129	Interstate Com.	19a	58-63
IV, F, 1, b	149	Interstate Com.	15a (1-6)	45-47
IV, F, 2	182	Interstate Com.	20a	70-75
IV, G, 1	195	Interstate Com.	2, 3 (1-3)	14-16
IV, G, 2	219	Interstate Com.	10 (1, 4)	30, 32
		Elkins	1 part, 3 part	92-94
IV, H, 3	244	Interstate Com.	4	17-18

xiv GOVERNMENT AND RAILROAD TRANSPORTATION

SECTION OF THIS BOOK	PAGE OF THIS BOOK	ACT	SECTIONS OF THE ACT	PAGES OF 1929 EDITION OF THE INTERSTATE COMMERCE ACT
IV, I, 2	268	Interstate Com.	1 (5)	3-4
IV, I, 3	282	Interstate Com.	6 (1, 2, 4-6, 7 part, 9-12)	23-24, 25, 26-27
IV, I, 4	283	Interstate Com.	6 (3)	24-25
IV, I, 5	284	Interstate Com.	6 (7) part	25
			10 (1 part, 2, 3)	30-32
IV, I, 7	291	Elkins	1 (1 part, 2)	92, 93
IV, I, 8	292	Interstate Com.	15 (7)	41-42
		Interstate Com.	6 (13) part	27-28
		Merchant Marine	8	192-193
IV, I, 9, a, (1)	297	Interstate Com.	15 (1-7, 13, 14)	38-42, 45
IV, I, 9, a, (2)	331	Interstate Com.	13 (3, 4)	36-37
IV, I, 9, b	346	Interstate Com.	15a (1-4)	45-47
IV, I, 9, c, (1)	362	Interstate Com.	15a (5, 6, 9, 17, 18)	47, 48, 51
IV, I, 9, c, (2)	371	Interstate Com.	15a (7-8)	48
IV, I, 9, c, (3)	371	Interstate Com.	15a (10-16)	48-51
IV, I, 10, a	373	Interstate Com.	1 (7), 22 (1) part	4-6, 75-77
		Miscellaneous		83-85
IV, I, 10, b	377	Interstate Com.	22 (1 part, 2, 3)	76-78
IV, I, 10, c	399	Merchant Marine	28	195-196
IV, I, 11	408	Hoch-Smith Res.	All	90-91
IV, J, 2, b	454	Hoch-Smith Res.	All	90-91
IV, K, 1	483	Interstate Com.	1 (10-17)	7-9
IV, K, 2	496	Interstate Com.	1 (15, 16), 3 (4)	8-9, 16
IV, K, 3	500	Interstate Com.	1 (18-22)	9-12
IV, K, 4	509	Interstate Com.	6 (13) part	27-28
IV, K, 5	514	Interstate Com.	1 (9)	6-7
IV, L, 1, b	522	Interstate Com.	5 (1, 3, 8)	18, 19, 21
IV, L, 2	527	Interstate Com.	5 (2, 3, 8)	18-19, 21
		Clayton	7 part	155-156
IV, L, 3	555	Interstate Com.	5 (9, 10, 11)	21-23
IV, L, 4	564	Interstate Com.	20a (12)	74-75
IV, L, 5	568	Clayton	10	159-160
IV, L, 6	574	Interstate Com.	1 (8)	6
IV, M	582	Interstate Com.	5 (4-8)	19-21
IV, N, 1	593	Safety Appliance	All	214-222
		Ash Pan	All	229-230
		Boiler Inspection	All	234-240
		Block Signal	All	241-242
		Interstate Com.	26	81-82
IV, N, 2	603	Hours of Service	All	227-229
IV, N, 3	607	Explosives	All	231-233
IV, N, 4	608	Accident Reports	All	222-224
IV, O, 5	620	Railway Labor	All	196-213
IV, P	624	Interstate Com.	25	79-81
IV, Q	628	Transportation	201, 500	123-125, 145-146
IV, R, 1	636	Interstate Com.	15 (8-10)	42-44
IV, R, 2	636	Interstate Com.	15 (11, 12)	44

TABLE OF CASES QUOTED

	PAGES
Abilene & Southern Railway Company et al., United States War Department, Inland Waterways, Mississippi-Warrior Service <i>v.</i> , 77 I. C. C. 317, 1923	307-322
Abilene Cotton Oil Company, Texas and Pacific Railway Company <i>v.</i> , 204 U. S. 426, 1907	117-123
Adriatic Mining Company et al. <i>v.</i> Chicago & North Western Railway Company et al., 78 I. C. C. 611, 1923	412-429
Alabama Midland Railway Company, Interstate Commerce Commission <i>v.</i> , 168 U. S. 144, 1897	224-233
Application of the Delaware, Lackawanna & Western Railroad Company for Authority to issue Capital Stock, 67 I. C. C. 426, 1921	183-190
Assigned Car Cases, The, 274 U. S. 564, 1927	484-495
Atchison, Topeka & Santa Fe Railway Company, Vitrolite Company <i>v.</i> , 89 I. C. C. 367, 1924	479-483
Atlantic Coast Line Railroad Company, Napier <i>v.</i> , 272 U. S. 605, 1926	598-602
Baltimore & Ohio Railroad Company <i>v.</i> Interstate Commerce Commission, 221 U. S. 612, 1911	603-606
Brimson, Interstate Commerce Commission <i>v.</i> , 154 U. S. 447, 1894	83-96
Brown <i>v.</i> Maryland, 12 Wheat. 419, 1827	6-11
California Growers' & Shippers' Protective League <i>v.</i> Southern Pacific Company, 129 I. C. C. 25, 32, 1927	454-456
Chicago & North Western Railway Company et al., Adriatic Mining Company et al. <i>v.</i> , 78 I. C. C. 611, 1923	412-429
Chicago, B. & Q. R. Co., Railroad Commission <i>v.</i> , 257 U. S. 563, 1921	331-339
Chicago, Burlington, & Quincy Railway Company <i>v.</i> United States, 220 U. S. 559, 1911	593-598
Chicago, Rock Island, & Pacific Railway Company, et al. <i>v.</i> United States of America, et al., 274 U. S. 29, 1927	293-297
Cincinnati, N. O. & T. P. Ry. Co., Interstate Commerce Commission <i>v.</i> , 167 U. S. 479, 1897	268-274
Class and Commodity Rates from Pennsylvania, 115 I. C. C. 331, 1926	263-266
Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>v.</i> United States, 275 U. S. 404, 1928	514-519
Colorado <i>v.</i> United States, 271 U. S. 153, 1926	500-507
Commonwealth of Massachusetts, Plumley <i>v.</i> , 155 U. S. 461, 1894	35-43

xvi GOVERNMENT AND RAILROAD TRANSPORTATION

	PAGES
Consolidated Southwestern Cases, 123 I. C. C. 203, 234, 1927	443-444
Consolidation of Railroads, 63 I. C. C. 476, 1921	582-590
Control of Central Pacific by Southern Pacific, 76 I. C. C. 508, 1923	527-537
Covington & Cincinnati Bridge Co. <i>v.</i> Kentucky, 154 U. S. 204, 1893	15-18
Dayton-Goose Creek Ry. Co. <i>v.</i> United States, 263 U. S. 456, 1924 . .	362-369
Drayage Absorptions by the Southwest Missouri Railroad Com- pany, 113 I. C. C. 179, 1926	457-464
Ex Parte 94, 148 I. C. C. 129, 1928	323-330
Export Bill of Lading, 64 I. C. C. 347, 1921	624-627
Farmers' Loan and Trust Company, Stone <i>v.</i> , 116 U. S. 307, 1886 . .	54-63
Galveston Commercial Association <i>v.</i> Galveston, Harrisburg & San Antonio Railway Company, 128 I. C. C. 349, 1927	465-478
Galveston, Harrisburg & San Antonio Railway Company, Galveston Commercial Association <i>v.</i> , 128 I. C. C. 349, 1927	465-478
Gibbons <i>v.</i> Ogden, 9 Wheat. 1, 1824	1-3
Goodrich Transit Company, Interstate Commerce Commission <i>v.</i> , 224 U. S. 194, 1912	97-105
Illinois Central Railroad Co. <i>v.</i> Interstate Commerce Commission, 206 U. S. 441, 1907	275-277
Illinois Central R. R. Co., United States <i>v.</i> , 263 U. S. 515, 1924 . . .	211-217
Import Rate Case, 162 U. S. 197, 1896	200-211
In Re Pooling Freights, 115 Fed. 588, 1902	520-521
In Re Section 28 of the Merchant Marine Act, 1920, 88 I. C. C. 645, 1924	404-407
Interchangeable Mileage Ticket Investigation, 98 I. C. C. 298, 1925	381-390
Intermountain Rate Cases, 234 U. S. 476, 1914	235-242
Interstate Commerce Commission <i>v.</i> Alabama Midland Railway Company, 168 U. S. 144, 1897	224-233
Interstate Commerce Commission, Baltimore & Ohio Railroad Com- pany <i>v.</i> , 221 U. S. 612, 1911	603-606
Interstate Commerce Commission <i>v.</i> Brimson, 154 U. S. 447, 1894 . .	83-96
Interstate Commerce Commission <i>v.</i> Cincinnati, N. O. & T. P. R. Co., 167 U. S. 479, 1897	268-274
Interstate Commerce Commission <i>v.</i> Goodrich Transit Company, 224 U. S. 194, 1912	97-105
Interstate Commerce Commission, Illinois Central Railroad Co. <i>v.</i> , 206 U. S. 441, 1907	275-277
Interstate Commerce Commission <i>v.</i> Union Pacific Railroad Com- pany, 222 U. S. 541, 1912	107-114
In the Matter of Intrastate Rates within the State of Illinois, 102 I. C. C. 479, 1925	391-397
In the Matter of Rates on and Classification of Lumber and Lumber Products, 52. I. C. C. 598, 1919	435-440
Kentucky, Covington & Cincinnati Bridge Co. <i>v.</i> , 154 U. S. 204, 1893	15-18

TABLE OF CASES QUOTED

xvii

PAGES

Lake Line Applications under Panama Canal Act, 33 I. C. C. 700, 1915	555-563
Lehigh Valley Railroad Co., <i>Meeker v.</i> , 236 U. S. 412, 426, 1915	80-81
Lehigh Valley R. R. Co., <i>United States v.</i> , 220 U. S. 257, 1911	575-581
Lignite Coal from North Dakota, 89 I. C. C. 726, 1924	445-454
Los Angeles R. R., <i>United States v.</i> , 273 U. S. 299, 1927	142-147
Maryland, <i>Brown v.</i> , 12 Wheat. 419, 1827	6-11
<i>Meeker v. Lehigh Valley Railroad Co.</i> , 236 U. S. 412, 426, 1915	80-81
Merchant Marine Act, 1920, In Re Section 28 of the, 88 I. C. C. 645, 1924	404-407
Minnesota Rate Cases, The, 230 U. S. 352, 1912	19-26
<i>Napier v. Atlantic Coast Line Railroad Company</i> , 272 U. S. 605, 1926	598-602
Nashville, Chattanooga, & St. Louis Railway et al. <i>v. State of Tennessee et al.</i> , 262 U. S. 318, 1923	374-377
New England Divisions Case, The, 261 U. S. 184, 1923	298-305
New York Central Railroad Company, <i>United States v.</i> , 263 U. S. 603, 1924	378-380
New York Central Railroad Company, <i>United States v.</i> , 272 U. S. 457, 1926	509-513
Nickel Plate Unification, 105 I. C. C. 425, 1926	537-554
O'Fallon Case, 73 L. ed. (Adv. Opin.) 457, 1929	149-181
Ogden, Gibbons <i>v.</i> , 9 Wheat. 1, 1824	1-3
Oregon-Washington Railroad and Navigation Co. <i>v. Washington</i> , 270 U. S. 87, 1926.	27-34
Pensacola Telegraph Co. <i>v. Western Union Telegraph Co.</i> , 96 U. S. 9, 1877	4-5
P. Koenig Coal Company, <i>United States v.</i> , 270 U. S. 512, 1926	221-223
Plumley <i>v. Commonwealth of Massachusetts</i> , 155 U. S. 461, 1894	35-43
Port Arthur Chamber of Commerce <i>v. T. & F. S. Ry. Co.</i> , 73 I. C. C. 361, 1922	496-499
Puget Sound-Portland Joint Passenger-Train Service, 96 I. C. C. 116, 1925	522-526
Railroad Commission <i>v. Chicago, B. & Q. R. Co.</i> , 257 U. S. 563, 1921	331-339
Reduced Rates, 1922, 68 I. C. C. 676, 1922	347-361
Regulations Relative to Bids of Carriers, 56 I. C. C. 847, 1920	568-574
St. Louis & O'Fallon Railway Company <i>v. United States</i> , 73 L. ed. (Adv. Opin.) 457, 1929	149-181
Southern Class Rate Investigation, 100 I. C. C. 513, 1925	440-443
Southern Pacific Company, California Growers' & Shippers' Protective League <i>v.</i> , 129 I. C. C. 25, 32, 1927	454-456
Southern Railway Company, Union Tanning Company <i>v.</i> , 26 I. C. C. 159, 1913	433-435
State of Tennessee et al., Nashville, Chattanooga, & St. Louis Railway et al. <i>v.</i> , 262 U. S. 318, 1923	374-377

xviii GOVERNMENT AND RAILROAD TRANSPORTATION

	PAGES
Stone <i>v.</i> Farmers' Loan and Trust Company, 116 U. S. 307, 1886 . . .	54-63
Suspension of Western Classification, 25 I. C. C. 442, 472, 1912 . . .	430-433
Tentative Valuation of the Texas Midland Railroad, 75 I. C. C. 108, 1918	129-142
Texarkana and Fort Smith Railway Co., Port Arthur Chamber of Commerce <i>v.</i> , 73 I. C. C. 361, 1922	496-499
Texas and Pacific Railway Company <i>v.</i> Abilene Cotton Oil Company, 204 U. S. 426, 1907	117-123
Texas Midland Railroad, Tentative Valuation of the, 75 I. C. C. 108, 1918	129-142
Transcontinental Rate Cases of 1922, 74 I. C. C. 48, 1922	244-262
Union Pacific Railroad Company, Interstate Commerce Commis- sion <i>v.</i> , 222 U. S. 541, 1912	107-114
Union Tanning Company <i>v.</i> Southern Railway Company, 26 I. C. C. 159, 1913	433-435
United States, Chicago, Burlington, & Quincy Railway Company <i>v.</i> , 220 U. S. 559, 1911	593-598
United States, Cleveland, Cincinnati, Chicago & St. Louis Railway Company <i>v.</i> , 275 U. S. 404, 1928	514-519
United States, Colorado <i>v.</i> , 271 U. S. 153, 1926	500-507
United States, Dayton-Goose Creek Ry. Co. <i>v.</i> , 263 U. S. 456, 1924 . .	362-369
United States, St. Louis & O'Fallon Railway Company <i>v.</i> , 73 L. ed. (Adv. Opin.) 457, 1929	149-181
United States, Wight <i>v.</i> , 167 U. S. 512, 1897	195-198
United States of America, et al., Chicago, Rock Island & Pacific Rail- way Company, et al. <i>v.</i> , 274 U. S. 29, 1927	293-297
United States <i>v.</i> Illinois Central R. R. Co., 263 U. S. 515, 1924 . . .	211-217
United States <i>v.</i> Lehigh Valley R. R. Co., 220 U. S. 257, 1911	575-581
United States <i>v.</i> Los Angeles R. R., 273 U. S. 299, 1927	142-147
United States <i>v.</i> New York Central Railroad Company, 263 U. S. 603, 1924	378-380
United States <i>v.</i> New York Central Railroad Company, 272 U. S. 457, 1926	509-513
United States <i>v.</i> P. Koenig Coal Company, 270 U. S. 512, 1926 . . .	221-223
United States War Department, Inland Waterways, Mississippi- Warrior Service <i>v.</i> Abilene & Southern Railway Company et al., 77 I. C. C. 317, 1923	307-322
Vitrolite Company <i>v.</i> Atchison, Topeka & Santa Fe Railway Com- pany, 89 I. C. C. 367, 1924	479-483
Washington, Oregon-Washington Railroad and Navigation Co. <i>v.</i> , 270 U. S. 87, 1926	27-34
Western Maryland Equipment Trust, Series D, 111 I. C. C. 434, 1926	190-194
Western Union Telegraph Co., Pensacola Telegraph Company <i>v.</i> , 96 U. S. 9, 1877	4-5
Wight <i>v.</i> United States, 167 U. S. 512, 1897	195-198

THE GOVERNMENT AND RAILROAD TRANSPORTATION

I. WHAT IS INTERSTATE COMMERCE?

A. OF WHAT DOES COMMERCE CONSIST?

The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.—Constitution of the United States, Article I, Section 8, paragraph 3

[A]

Gibbons *v.* Ogden

United States Supreme Court (1824), 9 Wheat. 1

[By acts passed in 1798, 1803, and 1808 the legislature of New York granted to R. R. Livingston and Robert Fulton the exclusive right of navigating with steam-propelled boats or vessels all rivers, bays, and waters within the jurisdiction of New York until 1838. An act of 1811 provided for the forfeiture to Livingston and Fulton of any steamboat or vessel navigating the said waters without the license of Livingston and Fulton. Ogden was the successor in title to these rights of Livingston and Fulton. Gibbons, a citizen of New Jersey, was the owner of a steamboat licensed under the act of Congress of 1793 to carry on coasting trade. This vessel was found navigating the waters between New Jersey and the city of New York, and Ogden secured an injunction from the New York courts restraining Gibbons from such use of his boat. Gibbons appealed.]

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the Constitution and laws of the United States.

2 GOVERNMENT AND RAILROAD TRANSPORTATION

They are said to be repugnant :

1st. To that clause in the Constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts. . . .

[Only that part of the opinion is given which relates to the definition of the word "commerce."]

The words are : "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as we aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of

America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted — that which the words of the grant could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one state, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." . . .

[The court held that the act of Congress was a proper exercise of the power over interstate commerce, and that the New York statutes in question were repugnant to it, and ordered that the decree of injunction be annulled.]

[B]

Pensacola Telegraph Co. *v.* Western Union
Telegraph Co.

United States Supreme Court (1877), 96 U. S. 9

[Extract from the opinion of the court delivered by WAITE, C. J.]

Since the case of *Gibbons v. Ogden*, 9 Wheat. 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates, show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad

regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it, the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress, certainly as against hostile state legislation. . . .

QUESTIONS

1. What is the difference between "traffic" and "intercourse" as the words are used by Chief Justice Marshall?

2. Could the Federal government, under the commerce clause of the Constitution, purchase all interstate telegraph systems in the United States?

3. An oil-producing corporation gets a monopoly of the pipe lines from the oil fields to the refineries and refuses to carry any oil therein unless it is sold to the corporation. Congress passes an act giving the Interstate Commerce Commission power to regulate all such corporations as common carriers. The corporation pleads that since it is carrying only its own oil it is not engaged in commerce and hence the act is unconstitutional. Decide.

4. Is the transportation of persons in street cars over a bridge between two states interstate commerce?

5. Texas imposes a tax on every message transmitted by telegraph companies doing business in Texas. Is this a regulation of interstate commerce?

6. Are interstate telephones instruments of commerce and hence subject to Federal regulation?

7. A state statute forbids any insurance company not incorporated in the state to carry on business without first depositing bonds and obtaining a state license. Is this a regulation of interstate commerce?

8. Congress makes it a criminal offense to transport in interstate commerce any motor vehicle known to have been stolen. D purchases a car which he knows has been stolen and drives it from Philadelphia to Baltimore. Has he violated the act? Is the act constitutional?

9. Gas is transported in pipe lines from one state to another for sale to distributing companies. Is this interstate commerce?

10. Is the manufacture of goods intended for transportation and sale in another state interstate commerce?

11. Is the hauling of empty freight cars commerce?

6 GOVERNMENT AND RAILROAD TRANSPORTATION

B. WHEN DOES COMMERCE BEGIN OR CEASE TO BE INTERSTATE?

Brown v. Maryland

United States Supreme Court (1827), 12 Wheat. 419

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the court :

This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality. The plaintiffs in error take the burthen upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

1. To that which declares that "no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to the laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope. . . .

What, then, is the meaning of the words "imposts or duties on imports or exports"?

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition. . . .

Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was

8 GOVERNMENT AND RAILROAD TRANSPORTATION

generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax the article while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. . . .

The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the states, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must therefore be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences. . . .

The constitutional prohibition on the states to lay a duty on imports — a prohibition which a vast majority of them must feel an interest in preserving — may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the

present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale, it constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and reexported in the same vessel, goods landed and carried over land for the purpose of being reexported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties. . . .

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends

10 GOVERNMENT AND RAILROAD TRANSPORTATION

to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution. . . .

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the Constitution which declares that "no state shall lay any imposts or duties on imports or exports."

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?" . . .

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states?

This question was considered in the case of *Gibbons v. Ogden* (9 Wheat. Rep. 1), in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. . . .

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. . . .

We think, then, that if the power to authorize a sale exists in Congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer

for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce. . . .

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the state of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the Constitution of the United States, and, consequently, void. The judgment is to be reversed and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

QUESTIONS

1. If a buyer from Brown had resold a package of dry goods without opening it, could he have been successfully prosecuted under the act quoted in *Brown v. Maryland*?

2. Why would it not be better to take the time when goods enter a state as the time when they cease to be imports rather than the time when they are commingled with other goods in the state?

3. Does not the test of the principal case amount to an unfair discrimination between wholesalers and retailers?

4. "The principles laid down in this case apply equally to importations from a sister state." Is this obiter dictum?

5. A state law imposes a tax of 2 per cent on all sales of petroleum oils made within a state. Will it be effective as to receipts from (1) sales of oil which when sold was not in the state? (2) sales of oil to be delivered from the state to points in another state? (3) sales of oil shipped into the state and sold from the storerooms of the importer in unbroken original packages? (4) sales of oil from broken packages?

12 GOVERNMENT AND RAILROAD TRANSPORTATION

6. A coal company in Pennsylvania ships coal in its own vessels to New Orleans to be sold there from the ship. While awaiting buyers is it subject to local taxation?

7. A state taxes all drummers selling goods by sample within the state. Is this an unconstitutional interference with interstate commerce?

8. A manufacturer of farm implements ships harrows in carload lots to another state, deposits them in a warehouse, and hires agents to load them on wagons and sell them direct to farmers. Are the agents bound to pay a license tax imposed by the state?

9. Is there any logical or practical justification, under the commerce clause, for drawing a distinction between the power of a state to tax goods imported from a foreign country and its power to tax goods brought in from another state? Where would you draw the line?

10. Congress passes a law barring certain adulterated goods from interstate commerce and providing that goods violating the statute may be seized at any time before resale by the importer, whether they are in original packages or not. Is the law constitutional?

11. A state forbids the importation and sale of cigarettes in any but the original packages. D, a dealer, imports cigarettes in small packages of ten each, unboxed but thrown loosely into a basket. Is the law constitutional? Is D liable for selling these packages to consumers?

12. P, a cattle-raiser in Kansas, herds five hundred cattle in a corral for shipment to Chicago. Storms and bad roads force him to postpone driving them to the railroad station for two weeks. During this time the county assessor visits him and includes the five hundred cattle in the property to be taxed. Advise P.

13. P, a lumberman in Maine, cuts one thousand logs and starts to float them down the Androscoggin River to a mill in Lewiston, Maine. On account of low water the logs are detained several months in a New Hampshire town and are included in other property of P's taxed there. Advise P.

14. Formulate a general rule as to when goods intended for interstate commerce pass beyond the regulation of the states.

15. A statute of state A forbids common carriers to convey cigarettes from one place to another within the state without first securing a certificate from a state official that the consignee is authorized to sell cigarettes in that state. A shipment of cigarettes from another state is placed by trainmen on the platform at the station of destination, and D, the station agent, moves them from the platform into a freight warehouse near, though he has no certificate. He is indicted by state A. Has he any defense?

16. Oil produced in Ohio and intended to fill orders of purchasers in Arkansas is transferred from tank cars to storage tanks in Memphis for the purpose of distribution in small tanks and barrels to be shipped to purchasers. Is the oil liable to taxation in Tennessee?

17. A river steamer regularly carries goods from St. Louis to ocean-bound steamers at New Orleans. Is it engaged in foreign commerce?

18. A railway between point X and point Y in Iowa runs for three quarters of the distance in Missouri. The Iowa Railway Commission fixes the rates between X and Y, and the railroad refuses to follow them on the ground that the action of the commission is a regulation of interstate commerce. Decide.

19. Machinery intended for exportation to Poland is shipped from Moline to Chicago on a local bill of lading, to be held there for transshipment to a lake steamer. Should the railroad charge the rate fixed by the Illinois Railway Commission or that fixed by the Interstate Commerce Commission?

20. The rate from points in Alabama to Madisonville, Ohio, is greater than the rate from those points to Oakley, Ohio, plus the rate from Oakley to Madisonville. D ships lumber on a bill of lading to Oakley, pays the freight, takes delivery of the loaded cars but without unloading them, and reships them on local bills to Madisonville at the local rate. The railroad sues to recover the difference between the two rates received and the through rate to Madisonville. Decide.

21. Is there any economic reason for a distinction between interstate commerce and intrastate commerce?

C. INTERSTATE COMMERCE WITHIN THE MEANING OF THE INTERSTATE COMMERCE ACT AS AMENDED

[A]

[The pertinent statutory provisions are found in Section 1, paragraphs 1, 2, and 3 of the Interstate Commerce Act as amended (I. C. Act, pp. 1-3). As originally enacted, the section referred only to transportation of passengers or property by railroad or partly by railroad and partly by water. It was amended by the Hepburn Act of 1906 to include the transportation of commodities partly or wholly by pipe line, and by the act of 1910 to include the transmission of messages by wire or wireless. The text was given its present form by the Transportation Act of 1920.]

QUESTIONS

1. Why should the Interstate Commerce Act include transportation partly by railroad and partly by water only when both are used under a common control, management, or arrangement for continuous carriage?

2. Why should the transportation of water and gas by pipe lines be excepted from the operation of the act?

14 GOVERNMENT AND RAILROAD TRANSPORTATION

3. A law of West Virginia requires producers of natural gas in that state to give consumers in the state a preference over consumers in other states. Is the law unconstitutional as a regulation of interstate commerce?

4. Illustrate the application of paragraph 2 (c) and justify the exception.

5. What is a "common carrier"?

6. Is common carriage by wagon and team within the act?

7. X owns a pipe line that carries in interstate transportation only oil belonging to X. Is he a common carrier within the act?

8. Is an electric railway between Chicago and Milwaukee within the act?

9. Is an interurban electric street railway connecting Council Bluffs, Iowa, with Omaha, Nebraska, within the act?

10. Is a motor-truck line between Chicago and Milwaukee within the act?

11. Is the Grand Trunk Railroad, which is a Canadian corporation, subject to the regulations of the Interstate Commerce Commission as to its business within the United States?

12. A terminal association supplies and operates terminal facilities for the collection and distribution of traffic and the interchange of traffic between railways entering a large city. Is it subject to regulation by the Interstate Commerce Commission?

[B]

[Section 7 of the act (I. C. Act, p. 28) should be read in this connection, because it is apparently intended to preserve the interstate character of interstate commerce. See the comment made by the Interstate Commerce Commission in *Railroad Commission of Kentucky v. L. & N. Railway Company*, 10 I. C. C. 173, 188: "Just what the seventh section may have been intended to accomplish is not certain. Possibly the legislature had in mind that railways might attempt to relieve themselves from its provisions by interrupting traffic at state lines, and thereby deprive it of the character of interstate business. The seventh section may have been intended to prevent this."]

II. RELATIVE POWERS OF FEDERAL AND STATE GOVERNMENTS IN REGULATION OF COMMERCE

A. POWER GIVEN EXCLUSIVELY TO THE FEDERAL GOVERNMENT

Covington & Cincinnati Bridge Co. *v.* Kentucky

United States Supreme Court (1893), 154 U.S. 204

[The bridge company, incorporated by an act of the Kentucky legislature in 1846, built a bridge across the Ohio River connecting the states of Ohio and Kentucky. In 1890 the Kentucky legislature passed an act fixing the rates of toll and fare for passage over this bridge and forbidding the company to sell tickets at higher rates. This case was an indictment against the bridge company for violation of the act.]

MR. JUSTICE BROWN delivered the opinion of the court :

. . . The power of Congress over commerce between the states and the corresponding power of individual states over such commerce have been the subject of such frequent adjudication in this court, and the relative powers of Congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to Congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive ; second, those in which the states may act in the absence of legislation by Congress ; third, those in which the action of Congress is exclusive and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and Congress has no right to interfere, concern the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power, the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state,

16 GOVERNMENT AND RAILROAD TRANSPORTATION

and regulate the tolls for the use of the same (*Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456), and may authorize the building of bridges over non-navigable streams, and otherwise regulate the navigation of the strictly internal waters of the state — such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries. . . .

Congress has no power to interfere with police regulations relating exclusively to the internal trade of the states (*United States v. DeWitt*, 9 Wall. 41; *Patterson v. Kentucky*, 97 U.S. 501) nor can it by exacting a tax for carrying on a certain business thereby authorize such business to be carried on within the limits of a state. *License Tax Cases*, 5 Wall. 462.

Under this power the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on. *Trade Mark Cases*, 100 U.S. 82.

Within the *second* class of cases — those of what may be termed concurrent jurisdiction — are embraced laws for the regulation of pilots, . . . quarantine and inspection laws and the policing of harbors, . . . the improvement of navigable channels, . . . the regulation of wharfs, piers, and docks, . . . the construction of dams and bridges across the navigable waters of a state, . . . and the establishment of ferries. . . .

[The citation of cases upon each of these points is omitted.]

Of this class of cases it was said by MR. JUSTICE CURTIS in *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 318: "If it were admitted that the existence of this power in Congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the Constitution, and with the judicial construction, given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." . . . But even in the matter of building a bridge, if Congress chooses to act, its action necessarily supersedes the action of the state.

Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421. As a matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and not affecting interstate commerce but incidentally, are national in their character, the non-action of Congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the *third* class — of those laws wherein the jurisdiction of Congress is exclusive. *Brown v. Houston*, 114 U.S. 622; *Bowman v. Chicago & N. W. R. Co.*, 125 U.S. 465. Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states. That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 6 Wall. 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also settled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent. . . .

This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of Congress or such other state, and thus involving the further inquiries, first, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The *first* question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196. . . .

With reference to the *second* question, an attempt is made to distinguish a bridge from a ferryboat, and to argue that while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. Commerce was defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189,

18 GOVERNMENT AND RAILROAD TRANSPORTATION

to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common-carrier. . . .

We do not wish to be understood as saying that, in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that charges shall be reasonable, and the question of reasonableness must be settled as other questions of a judicial nature are settled, by the evidence in the particular case. . . . Nor are we to be understood as passing upon the question whether, in the absence of legislation by Congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the commonwealth of Kentucky in this case is an attempted regulation of commerce which it is not within the power of the state to make. . . .

The judgment of the court of appeals of Kentucky is, therefore, reversed, and the case remanded to that court for further proceeding in conformity with this opinion. . . .

QUESTIONS

1. In which of the three classes of powers mentioned in the opinion does the fixing of charges upon the Covington bridge fall?
2. If the constitutionality of a state statute is questioned under the commerce clause, what lines of defense are open?
3. Since state laws, both of the second and the third class, affect interstate commerce, why should non-action by Congress be construed to permit state action in the one case and to forbid it in the other?
4. In the absence of congressional action why should laws for the establishment of ferries be within the power of a state and not laws fixing rates across interstate bridges?

5. Since Congress has not fixed other rates, what objection is there to permitting state regulation of toll rates across interstate bridges to stand?

6. Can you suggest a test for ascertaining whether in a given case the failure of Congress to regulate interstate commerce in a particular way is or is not conclusive evidence of its intention that it shall be free from regulation in that respect?

7. A Louisiana statute forbids persons engaged as common carriers within the state to discriminate in the treatment of passengers on the ground of race or color. D, the master of a Mississippi steamboat plying between New Orleans and Vicksburg, is indicted under the statute for refusing to admit to a cabin set apart for white persons a colored person going from New Orleans to Hermitage, Louisiana. Is he liable?

8. A state law imposes a license tax upon all peddlers selling goods not produced within the state. In the absence of congressional legislation, is the law good?

9. "Although the power to regulate interstate and foreign commerce is found in the same clause and conferred by the same words, the scope of the power, when applied to the former, may be narrower than when applied to the latter." Comment on this statement.

10. Have the state authorities any control over rates charged for gas brought in pipe lines from another state for sale to distributing companies?

11. Is the question of the extent to which commerce should be free from regulation in the absence of Federal legislation primarily one of law, or is it one to be determined largely by economic considerations?

B. POWER EXERCISED BY THE STATES SUBJECT TO SUBSEQUENT ACTION BY THE FEDERAL GOVERNMENT

[A]

The Minnesota Rate Cases

United States Supreme Court (1912), 230 U.S. 352

MR. JUSTICE HUGHES delivered the opinion of the court :

These suits were brought by stockholders of the Northern Pacific Railway Company, the Great Northern Railway Company, and the Minneapolis & St. Louis Railroad Company, respectively, to restrain the enforcement of two orders of the Railroad & Warehouse Commission of the state of Minnesota, and two acts of the legislature of that state, prescribing maximum charges for transportation of freight and passengers, and to prevent the adoption or maintenance of these rates by the railroad companies. . . .

20 GOVERNMENT AND RAILROAD TRANSPORTATION

None of the acts and orders prescribes rates for goods or persons moving in interstate commerce. By their terms, they apply solely to commerce that is internal. Despite this obvious purport, it has been found below that the inevitable effect of the state's requirements for interstate transportation was to impose a direct burden upon interstate commerce, and to create unjust discriminations between localities in Minnesota and those in adjoining states; and hence, that they must fall, as repugnant to the commerce clause and to the action of Congress under it. . . .

In the case of each company, the movement of interstate and local traffic takes place at the same time, on the same rails, with the same employees, and largely by means of the same trains and cars. There has never been a separation, and it is impracticable, in the exercise of fair economy, to make a separation, between the interstate and intrastate business in the case either of freight or of passengers. By far the larger part of the traffic is interstate. . . .

A scheme of state rates framed to avoid discrimination between localities within the state, and to provide an harmonious system for intrastate transportation throughout the state, naturally would embrace those places within the state which are on or near the state's boundaries; and when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to points adjacent to, but across, the state line. . . .

With appreciation of the gravity of the controversy, the railroad commissioners of eight states have filed their brief as *amici curiae*, in support of the appeals, stating that, if the doctrine of the court below were accepted, the regulation by the states of rates for intrastate transportation would be practically destroyed. They say that "there is practically no movement of traffic between two towns within a state that does not come into competition with some interstate haul," and that "if the disturbance of the existing relation between competitive state and interstate rates is the correct criterion, no reduction can be made in state rates without interfering with interstate commerce." . . .

For the purpose of the present inquiry, the rates fixed by the state must be assumed to be reasonable rates so far as intrastate traffic is concerned; that is, they must be rates which the state in the exercise of its legislative judgment, could constitutionally fix for intrastate transportation separately considered. If the state rates are not of this

character, — a question to be dealt with later, — they cannot be sustained in any event; but, assuming them to be otherwise valid, the decree below, with respect to the present branch of the case, rests upon two grounds: (1) That the action of the state imposes a direct burden upon interstate commerce; and (2) that it is in conflict with the provisions of the act to regulate commerce.

These grounds are distinct. If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of Federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of Federal regulation, should be free. If the acts of Minnesota constitute a direct burden upon interstate commerce, they would be invalid without regard to the exercise of Federal authority touching the interstate rates said to be affected. On the other hand, if the state, in the absence of Federal legislation, would have had the power to prescribe the rates here assailed, the question remains whether its action is void as being repugnant to the statute which Congress has enacted.

Prior to the passage of the act to regulate commerce, carriers fixed their interstate rates free from the actual exertion of Federal control; and under that act, as it stood until the amendment of June 29, 1906 (34 Stat. at L. 584, chap. 3591), the Interstate Commerce Commission had no power to prescribe interstate rates. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479. The states, however, had long exercised the power to establish maximum rates for intrastate transportation. Was this power, apart from Federal action, subject to the limitation that the state could not fix intrastate rates, reasonable as such, generally throughout the state, but only as to such places and in such circumstances that the interstate business of the carriers would not be thereby affected? That is, was the state debarred from fixing reasonable rates on traffic, wholly internal, as to all state points so situated that, as a practical consequence, the carriers would have to reduce the rates they had made to competing points without the state, in order to maintain the volume of their interstate business, or to continue the parity of rates, or the relation between rates as it had previously existed? Was the state, in prescribing a general tariff of reasonable intrastate rates otherwise within its authority bound not to go below a minimum standard established by the interstate rates made by the carriers within competitive districts? If the state power, independently of Federal legislation, is thus limited, the inquiry need proceed no further. Otherwise

22 GOVERNMENT AND RAILROAD TRANSPORTATION

it must be determined whether Congress has so acted as to create such a restriction upon the state authority theretofore existing.

1. The general principles governing the exercise of state authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. . . .

There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the National power within its appointed sphere. . . .

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation, the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act: and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. . . .

The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains.

Thus, the states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it; . . . or upon persons or property in transit in interstate commerce. . . .

They have no power to prohibit interstate trade in legitimate articles of commerce . . . or to discriminate against the products of other states . . . or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on; . . . or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of suitable local protection. . . .

[The citation of cases upon each of these points is omitted.]

But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved. Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision

24 GOVERNMENT AND RAILROAD TRANSPORTATION

for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible. . . .

2. These principles apply to the authority of the state to prescribe reasonable maximum rates for intrastate transportation.

State regulation of railroad rates began with railroad transportation. The railroads were chartered by the states, and from the outset, in many charters, maximum rates for freight or passengers, or both, were prescribed.

The authority of the state to limit by legislation the charges of common carriers within its borders was not confined to the power to impose limitations in connection with grants of corporate privileges. In view of the nature of their business, they were held subject to legislative control as to the amount of their charges unless they were protected by their contract with the state. . . .

It became a frequent practice for the states to create commissions, as agencies of state supervision and regulation, and in many instances the rate-making power was conferred upon these bodies. . . .

In *Wabash St. L. & P. R. Co. v. Illinois*, 118 U.S. 557, it was finally determined that the authority of the state did not extend to the regulation of charges for interstate transportation. . . .

The doctrine was thus fully established that the state could not prescribe interstate rates, but could fix reasonable intrastate rates throughout its territory. The extension of railroad facilities has been accompanied at every step by the assertion of this authority on the part of the states and its invariable recognition by this court. . . .

As a power appropriate to the territorial jurisdiction of the state, it is not confined to a part of the state, but extends throughout the state, — to its cities adjacent to its boundaries as well as to those in the interior of the state. To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert

that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the state to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the state's border is foreign to our jurisprudence.

If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province. . . .

The question we have now before us, essentially, is whether, after the passage of the Interstate Commerce Act, and its amendment, the state continued to possess the state-wide authority which it formerly enjoyed to prescribe reasonable rates for its exclusively internal traffic. That, as it plainly appears, was the nature of the action taken by Minnesota, and the attack, however phrased, upon the rates here involved as an interference with interstate commerce, is in substance a denial of that authority.

Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith. . . . The interblending of operations in the conduct of interstate and local business by interstate carriers is strongly pressed upon our attention.

But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments, the measure of the regulation it

26 GOVERNMENT AND RAILROAD TRANSPORTATION

should supply. It is the function of this court to interpret and apply the law already enacted, but not, under the guise of construction, to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the state enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power.

[The part of the opinion dealing with the confiscatory character of the state's acts and orders is omitted.]

QUESTIONS

1. What tests would you suggest for determining whether a given piece of state legislation affecting interstate commerce is (1) unconstitutional even in the absence of congressional legislation, or (2) valid till Congress passes a law covering the same subject matter?

2. In either case is not the state legislation a regulation of interstate commerce? If so, why should it not always be valid till Congress acts or always be void whether Congress has acted or not?

3. Why is the decision in the principal case not contrary to "the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce"?

4. Were the acts of Minnesota an exercise of the police power of the state, or not?

5. Was not the effect of the Minnesota legislation practically to prescribe in many cases "the rates to be charged for transportation from one state to another"?

6. Why was it not as necessary for Kentucky to establish for the Covington bridge tolls adapted to the local exigency as for Minnesota to establish intra-state fares on the railroads in the principal case?

7. Why was the *court* not bound to uphold the legislation of Kentucky in the Covington case until *Congress* should have decided that Federal regulation was necessary?

8. A law of Illinois fixes a maximum freight rate for all freight transported within the state. The Chicago, Rock Island, and Pacific refuses to apply it to shipments from Chicago to Omaha, even as to the Chicago-Rock-Island part of the trip. Can it be compelled to do so?

9. Could a state build a railroad line of its own and control all rates charged on it?

10. If the Federal government owned the railroads could the states still regulate intrastate rates?

11. Under what circumstances can Congress fix intrastate rates?

12. If Congress, in the principal case, had provided that carriers in interstate commerce should make no discrimination in rates in favor of any locality, and the Interstate Commerce Commission (authorized to enforce this provision) had found that the rates fixed by Minnesota resulted in unfair discrimination against towns in North Dakota as compared with competing towns in Minnesota, could the railroad have been forced to remove the discrimination?

[B]

Oregon-Washington Railroad and Navigation Co. *v.* Washington

United States Supreme Court (1926), 270 U.S. 87

[A Washington statute of 1921 authorized the Director of Agriculture, after investigation, to establish and maintain necessary quarantines against infectious plant diseases, injurious insects, or weed pests, and to provide penalties for violations of the act. After due investigation the director ordered a quarantine against the alfalfa weevil and forbade the importation of alfalfa hay from certain sections of Utah, Idaho, Wyoming, Colorado, Oregon, and Nevada, which were found to be infested districts, except in small containers. The plaintiff in error brought alfalfa into the state in violation of the act and intended to continue to do so. Upon complaint of the state of Washington the superior court of Thurston County enjoined the company from further violations of the act, and the superior court of the state affirmed the decree. The case was then taken to the Supreme Court of the United States on a writ of error.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court :

... In the absence of any action taken by Congress on the subject matter, it is well settled that a state in the exercise of its police power may establish quarantines against human beings or animals or plants, the coming in of which may expose the inhabitants or the stock or the trees, plants or growing crops to disease, injury or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce.

CHIEF JUSTICE MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 1, speaking of inspection laws, says at page 203 :

28 GOVERNMENT AND RAILROAD TRANSPORTATION

They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

Again, he says at page 205 :

The acts of Congress, passed in 1796 and 1799, empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a state, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a state may rightfully regulate commerce with foreign nations, or among the states; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a state, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the states bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the states. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the state laws, so far as it may be necessary to control them, for the regulation of commerce.

This court, in the Minnesota Rate Cases (*Simpson v. Shepard*), 230 U.S. 352, 406, said :

Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with Federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the matter for the most part, notwithstanding its vast importance, to the states and has repeatedly acquiesced in the enforcement of state laws. . . . Such laws undoubtedly operate upon interstate and foreign commerce. They could not be effective otherwise. They cannot, of course, be made the cover for discriminations and arbitrary enactments having no reasonable relation to health (*Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 472, 473); but the power of the state to take steps to prevent the introduction or spread of disease, although interstate

and foreign commerce are involved (subject to the paramount authority of Congress if it decides to assume control), is beyond question. [The citation of cases to this effect is omitted.]

Counsel for the company argues that the case of *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, is an authority to show that this law as carried out by the proclamation goes too far, in that it forbids importations from certain parts of Idaho, of Utah, of Nevada, of alfalfa hay, without qualifications and without any limit of time. The *Husen* case is to be distinguished from the other cases cited, in that the Missouri statute there held invalid was found by the court not to be a quarantine provision at all. It forbade the importation into Missouri for eight months of the year of any Texas, Mexican, or Indian cattle without regard to whether the cattle were diseased or not, and without regard to the question whether they came from a part of the country where they had been exposed to contagion. We think that here the investigation required by the Washington law and the investigation actually made into the existence of this pest and its geographical location makes the law a real quarantine law and not a mere inhibition against importation of alfalfa from a large part of the country without regard to the conditions which might make its importation dangerous.

The second objection to the validity of this Washington law and the action of the state officers, however, is more formidable. Under the language used in *Gibbons v. Ogden*, *supra*, and the *Minnesota Rate Cases*, *supra*, the exercise of the police power of quarantine, in spite of its interfering with interstate commerce, is permissible under the Interstate Commerce clause of the Federal Constitution, "subject to the paramount authority of Congress, if it decides to assume control."

By the act of Congress of August 20, 1912, 37 Stat. at L. 315, chap. 308, as amended by the act of March 4, 1917, 39 Stat. at L. 1165, chap. 179, it is made unlawful to import or offer for entry into the United States, any nursery stock unless permit had been issued by the Secretary of Agriculture under regulations prescribed by him.

Section 2 makes it the duty of the Secretary of the Treasury to notify the Secretary of Agriculture of the arrival of any nursery stock and forbids the shipment from one state or territory or district of the United States into another of any nursery stock imported into the United States without notifying the Secretary of Agriculture, or at his direction, the proper state, territorial or district official to which the nursery stock was destined. Whenever the Secretary of Agriculture shall determine that such nursery stock may result in the entry of

30 GOVERNMENT AND RAILROAD TRANSPORTATION

plant diseases or insect pests, he shall promulgate his determination of this, but shall give due notice and a public hearing at which any interested party might appear before the promulgation.

Section 7 provides that whenever, in order to prevent the introduction into the United States of any tree, plant or fruit disease or any injurious insect, not theretofore widely prevalent or distributed within and through the United States, the Secretary shall determine that it was necessary to forbid the importation into the United States, he shall promulgate such determination, and such importations are thereafter prohibited.

Section 8 of the act was amended by the Agricultural Appropriation Act of March 4, 1917, and reads as follows :

SECTION 8. That the Secretary of Agriculture is authorized and directed to quarantine any state, territory, or district of the United States, or any portion thereof, when he shall determine that such quarantine is necessary to prevent the spread of a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States ; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined state or territory or district of the United States, or from any quarantined portion thereof, into or through any other state or territory or district, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine except as herein-after provided. That it shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined state or territory or district of the United States or quarantined portion thereof, into or through any other state or territory or district, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture, when the public interests will permit, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the

class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products, or any class of stone or quarry products, or any other article of any character whatsoever, capable of carrying any dangerous plant disease or insect infestation, specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined state or territory or district of the United States, or quarantined portion thereof, into or through any other state or territory or district; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: Provided, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any state, territory, or district of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney.

Section 10 of the act provides that any person who shall violate any provisions of the act, or who shall forge, counterfeit, or destroy any certificate provided for in the act or in the regulations of the Secretary of Agriculture, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court. It is made the duty of the United States attorneys diligently to prosecute any violations of this act which are brought to their attention by the Secretary of Agriculture, or which come to their notice by other means, and that for the purpose of carrying out the provisions of the act, the Secretary of Agriculture shall appoint from existing bureaus in his office, a commission of five members employed therein.

It is impossible to read this statute and consider its scope without attributing to Congress the intention to take over to the Agricultural Department of the Federal government the care of the horticulture and agriculture of the states, so far as these may be affected injuriously by the transportation in foreign and interstate commerce of anything which by reason of its character can convey disease to and injure trees, plants or crops. All the sections look to a complete provision for quarantine against importation into the country and quarantine as between the states under the direction and supervision of the Secretary of Agriculture.

The courts of Washington and the counsel for the state rely on the decision of this court in *Reid v. Colorado*, 187 U.S. 137, as an authority

32 GOVERNMENT AND RAILROAD TRANSPORTATION

to sustain the validity of the Washington law before us. The Reid case involved the constitutionality of a conviction of Reid for violation of an act of Colorado to prevent the introduction of infectious or contagious diseases among the cattle and horses of that state. The law made it unlawful for any person, association or corporation to bring or drive any cattle or horses, suffering from such disease or which had within ninety days prior thereto been herded or brought into contact with any other cattle or horses, suffering from such disease, into the state, unless a certificate or bill of health could be produced from the state veterinary sanitary board that the cattle and horses are free from all infectious or contagious diseases. It was urged that it was inconsistent with the Federal Animal Industry Act. This directed a study of contagious and communicable diseases of animals and the best method of treating them by the Federal Commissioner of Agriculture, to be certified to the executive authority of each state and the coöperation of such authority was invited. If the authorities of the state adopted the plans and methods advised by the Department, or if such authorities adopted measures of their own which the Department approved, then the money appropriated by Congress was to be used in conducting investigations and in aiding such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one state or territory into another. This court held that Congress did not intend by the act to override the power of the states to care for the safety of the property of their people, because it did not undertake to invest any officer or agent of the Department with authority to go into a state and without its assent take charge of the work of suppressing or extirpating contagious, infectious or communicable diseases there prevailing, or to inspect cattle or give a certificate of freedom from disease for cattle of superior authority to state certificates.

It is evident that the Federal statute under consideration in the Reid case was an effort to induce the states to coöperate with the general government in measures to suppress the spread of disease without at all interfering with the action of the state in quarantining or taking any other measures to extirpate it or prevent its spread. Indeed the Commissioner of Agriculture in that case was to aid the state authorities in their quarantine and other measures from Federal appropriation. The act we are considering is very different. It makes no reference whatever to coöperation with state authorities. It proposes the independent exercise of Federal authority with reference to quarantine

in interstate commerce. It covers the whole field, so far as the spread of the plant disease by interstate transportation can be affected and restrained. With such authority vested in the Secretary of Agriculture, and with such duty imposed upon him, the state laws of quarantine that affect interstate commerce and the Federal law cannot stand together. The relief sought to protect the different states, in so far as it depends on the regulation of interstate commerce, must be obtained through application to the Secretary of Agriculture.

In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action.

Cases of the latter type are the *Southern R. Co. v. Reid*, 222 U. S. 424; *Northern P. R. Co. v. Washington*, 222 U. S. 370; *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426; *Erie R. Co. v. New York*, 233 U. S. 671; and *Missouri P. R. Co. v. Stroud*, 267 U. S. 404.

... It follows that pending the existing legislation of Congress as to quarantine of diseased trees and plants in interstate commerce, the statute of Washington on the subject cannot be given application. It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that cannot be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted.

The decree of the Supreme Court of Washington is reversed.

MR. JUSTICE McREYNOLDS and MR. JUSTICE SUTHERLAND, dissenting:

We cannot think Congress intended that the act of March 4, 1917, without more, should deprive the states of power to protect themselves against threatened disaster like the one disclosed by this record.

34 GOVERNMENT AND RAILROAD TRANSPORTATION

If the Secretary of Agriculture had taken some affirmative action the problem would be a very different one. Congress could have exerted all the power which this statute delegated to him by positive and direct enactment. If it had said nothing whatever certainly the state could have resorted to the quarantine; and this same right, we think, should be recognized when its agent has done nothing.

It is a serious thing to paralyze the efforts of a state to protect her people against impending calamity, and leave them to the slow charity of a far-off and perhaps supine Federal bureau. No such purpose should be attributed to Congress unless indicated beyond reasonable doubt.

QUESTIONS

1. What justification is there for the doctrine enunciated in *Gibbons v. Ogden* that Congress under the commerce power can interfere with a state's quarantine laws?

2. Does the court satisfactorily distinguish the principal case from *Hannibal & St. J. R. Co. v. Husen*?

3. In dealing with legislation like the Federal statute in the principal case how is it possible to tell whether Congress intended to occupy the field exclusively, or concurrently with the states?

4. Does the court meet the objections raised in the dissenting opinion?

5. As a matter of public policy is it desirable that the United States Department of Agriculture be given complete authority to make provision for the protection of trees, plants, and crops from disease which may be transmitted in interstate commerce?

6. In 1884 Congress passed an act making it a misdemeanor to transport diseased cattle in interstate commerce. In 1885 the Kansas legislature provided that anyone importing diseased cattle into the state should be liable in damages to persons who sustained a loss as the result of such importation. D, sued under the Kansas statute, pleads its unconstitutionality. Decide.

7. Congress has passed an act providing for the fixing and publication of rates by interstate carriers before shipments may be accepted. A state statute provides that carriers declining to receive and forward freight tendered for transportation shall be penalized fifty dollars a day. P sues the D railroad under the state statute. D pleads that it is superseded by the Federal statute. P replies that the state statute is in aid of the Federal statute and hence is valid. Decide. Is there any difference between this case and the one in Question 6?

8. Congress passes an act limiting the hours of employment of trainmen in interstate commerce and providing that the act shall not go into operation for one year. A month later a state legislature passes a similar law applicable

to carriers within the state and taking effect at once. The D railroad is indicted under the second act for a violation which took place on an interstate train. Decide.

9. After the act of Congress in Question 8 has become effective a state legislature passes an act prescribing still shorter hours of labor. Is a railroad liable to observe the latter as to its interstate trains? Would it make any difference if the railroad were incorporated in the state in question?

10. In 1924, during an epidemic of the hoof-and-mouth disease in New Mexico and Arizona, the government of California, acting under a state law, established and maintained a quarantine against all cattle coming from those states. Was the quarantine legal?

C. POWER GIVEN EXCLUSIVELY TO THE STATES

Plumley *v.* Commonwealth of Massachusetts

United States Supreme Court (1894), 155 U.S. 461

[An act of Congress of August 2, 1886, defined oleomargarine, imposed a tax of two cents a pound on all oleomargarine manufactured and sold, required that manufacturers and dealers in that product should obtain a Federal license, and made various provisions regarding the packing, marketing, and supervision of the manufacture and sale of oleomargarine. A Massachusetts law of March 10, 1891, forbade anyone in that state to manufacture, sell, or offer to sell any fat compound which should be in imitation of yellow butter produced from pure unadulterated milk or cream, and provided penalties for the violation of the act. Plumley was a Massachusetts agent for Illinois manufacturers of oleomargarine which was artificially colored to resemble butter. Both he and the manufacturers complied with the Federal law of 1886 in all respects. Having sold some of the oleomargarine in the original package in Massachusetts, he was found guilty of violating the act of 1891 and was committed to jail. He sued out a writ of *habeas corpus* from the Supreme Judicial Court of Massachusetts, claiming, *inter alia*, that the Massachusetts statute was repugnant to the commerce clause of the Constitution and to the Federal law of 1886. The Massachusetts court refused to order his release, and he brought the case to the United States Supreme Court on writ of error.]

MR. JUSTICE HARLAN delivered the opinion of the court :

. . . The learned counsel for the appellant states that Congress in the act of August 2, 1886, has legislated fully on the subject of oleomar-

garine. This may be true so far as the purposes of that act are concerned. But there is no ground to suppose that Congress intended in that enactment to interfere with the exercise by the states of any authority they could rightfully exercise over the sale within their respective limits of the article defined as oleomargarine. The statute imposed certain special taxes upon manufacturers of oleomargarine, as well as upon wholesale and retail dealers in that compound. And it is expressly declared (Section 3) that Sections 3232 to 3241 inclusive and Section 3243 of the Revised Statutes, title, "Internal Revenue," "are, so far as applicable, made to extend to and include and apply to the special taxes" so imposed, "and to the persons upon whom they are imposed." Section 3243 of the Revised Statutes is in these words:

The payment of any tax imposed by the internal-revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any state for carrying on the same within such state, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such state or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any state from placing a duty or tax on the same trade or business, for state or other purposes.

It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the states over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any state which lawfully forbade such manufacture or sale, or to disregard any regulations which a state might lawfully prescribe in reference to that article. *License Tax Cases*, 5 Wall. 462, 474; *Pervear v. Massachusetts*, 5 Wall. 475; *United States v. De Witt*, 9 Wall. 41.

Nor was the act of Congress relating to oleomargarine intended as a regulation of commerce among the states. Its provisions do not have special application to the transfer of oleomargarine from one state of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard from penalty or punishment so far as the general government is concerned, but they do not interfere with the exer-

cise by the states of any authority they possess of preventing deception or fraud in the sales of property within their respective limits.

The vital question in this case is, therefore, unaffected by the act of Congress or by any regulations that have been established in execution of its provisions. That question is, whether, as contended by the petitioner, the statute under examination in its application to sales of oleomargarine brought into Massachusetts from other states is in conflict with the clause of the Constitution of the United States investing Congress with power to regulate commerce among the several states. This is the only question the learned counsel for the petitioner urges upon our attention, and, in view of the decision in *Powell v. Pennsylvania*, 127 U.S. 678, is the only one that we need consider.

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears, in this case, that oleomargarine, in its natural condition, is of "a light yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If anyone thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that state or to sell it there in such manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it

really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to anyone the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?

Several cases in this court were cited in argument to support the contention that the grant of power to Congress to regulate interstate commerce extended to such legislation as that enacted by the commonwealth of Massachusetts. Let us see whether those cases announce any principle that compels this court to adjudge that the states have surrendered to the general government the power to prevent fraud in the sales of property.

Hannibal & St. J. R. Co. v. Husen, 95 U.S. 465, 473, involved the validity of a statute of Missouri which was so framed as to prevent the bringing into that state of any Texan, Mexican, or Indian cattle, between March 1 and December 1 in any year, whether free from disease or not, or whether their coming into the state would be injurious to its inhabitants or not. If they were brought into Missouri for the purpose of carrying them through that state without unloading them, such burdens and restrictions were imposed as amounted to an exclusion from its limits of any cattle such as those described in the statute. This court held that the Missouri statute was neither a quarantine nor an inspection law; that its object and effect was to meet at the borders of Missouri a large and common subject of commerce and prohibit its crossing the state line during the larger part of each year, and to obstruct interstate commerce and discriminate between the property of citizens of one state and that of citizens of other states. The statute was, consequently, adjudged to be unconstitutional.

Minnesota v. Barber, 136 U.S. 313, 322, involved the validity of a statute of Minnesota which, by its necessary operation, excluded from the markets of that state all fresh beef, veal, mutton, lamb, or pork, in whatever form, and although entirely sound, healthy, and fit for human food, taken from animals slaughtered in other states; and which directly tended to restrict the slaughtering of animals, whose meat was to be sold in Minnesota, to those engaged in such business in that state. The court said:

If the object of the statute had been to deny altogether to the citizens of other states the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb, or pork, from animals slaughtered outside of that state, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the state, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the state, that object is attained by the act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota statute. If this legislation does not make such discrimination against the products and business of other states in favor of the products and business of Minnesota as interferes with and burdens commerce among the several states, it would be difficult to enact legislation that would have that result. . . .

It is obvious that none of the above cases presented the question now before us. Each of them involved the question whether one state could burden interstate commerce by means of discriminations enforced for the benefit of its own products and industries at the expense of the products and industries of other states. It did not become material in any of them to inquire, nor did this court inquire, whether a state, in the exercise of its police powers, may protect the public against the deception and fraud that would be involved in the sale within its limits for purposes of food of a compound that had been so prepared as to make it appear to be what it was not. While in each of those cases it was held that the reserved police powers of the states could not control the prohibitions of the Federal Constitution nor the powers of the government it created (*New Orleans Gas Light Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U.S. 650) it was distinctly stated that the grant to Congress of authority to regulate foreign and interstate commerce did not involve a surrender by the states of their police powers. If the statute of Massachusetts had been so framed as to be applicable only to oleomargarine manufactured in other states, and which had been made in imitation of pure butter, the case would have been wholly different. But we have seen that it is not of that character, but is aimed at all oleomargarine artificially colored so as to *cause* it to look like genuine butter and offered for sale in Massachusetts.

In none of the above cases is there to be found a suggestion or intimation that the Constitution of the United States took from the states the power of preventing deception and fraud in the sale, within their respective limits, of articles in whatever state manufactured, or that that instrument secured to anyone the privilege of committing a wrong against society. . . .

40 GOVERNMENT AND RAILROAD TRANSPORTATION

If there be any subject over which it would seem the states ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one state to another state. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the states. . . .

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may be introduced into a state and there sold in original packages, without any restriction being imposed by the state upon such sale, is *Leisy v. Hardin*, 135 U.S. 100.

The majority of the court in that case held that ardent spirits, distilled liquors, ale and beer, were subjects of exchange, barter, and traffic, and being articles of commerce, their sale while in the original packages in which they are carried from one state to another state, could not without the assent of Congress be forbidden by the latter state; that the parties in that case, who took beer from Illinois into Iowa, had the right, under the Constitution of the United States, to sell it in Iowa in such original packages, any statute of that state to the contrary notwithstanding; and that Iowa had no control over such beer until the original packages were broken and the beer in them became mingled in the common mass of property within its limits. "Up to that point of time," the court said, "we hold that in the absence of congressional permission to do so, the state had no power to interfere by seizure, or any other action in prohibition of importation and sale by the foreign or nonresident importer" (p. 124).

It is sufficient to say of *Leisy v. Hardin* that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of that state to the contrary notwithstanding, was beer manufactured in Illinois and shipped to the former state to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. The language we have quoted from *Leisy v. Hardin*

must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy and which is wholly different from what its condition and appearance import. . . .

It has therefore been adjudged that the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people, may be done by the states in the exercise of the right of self-defense. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use and eagerly sought by people in every condition of life, are protected by the Constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstance that it is in an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to anyone the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society ; and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several states. It is legislation which "can be most advantageously exercised by the states themselves." *Gibbons v. Ogden*, 9 Wheat. 203. . . .

Judgment affirmed.

MR. JUSTICE JACKSON, now absent, was present at the argument and participated in the decision of this case. He concurs in this opinion.

MR. CHIEF JUSTICE FULLER dissenting:

The power vested in Congress to regulate commerce among the several states is the power to prescribe the rule by which that commerce is to be governed, and, as that commerce is national in its character and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the states to do so, it thereby indicates its will that such commerce shall be free and untrammelled. Manifestly, whenever state legislation comes in conflict with that will, it must give way.

In whatever language such legislation may be framed, its purpose must be determined by its natural and reasonable effect, and the presumption that it was enacted in good faith cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.

Upon this record, oleomargarine is conceded to be a wholesome, palatable, and nutritious article of food, in no way deleterious to the public health or welfare. It is of the natural color of butter and looks like butter, and is often colored, as butter is, by harmless ingredients, a deeper yellow, to render it more attractive to consumers. The assumption that it is thus colored to make it appear to be a different article, generically, than it is, has no legal basis in this case to rest on. It cannot be denied that oleomargarine is a recognized article of commerce, and moreover, it is regulated as such, for revenue purposes, by the act of Congress of August 2, 1886 (24 Stat. at L. 209, chap. 840); *United States v. Eaton*, 144 U.S. 677.

The act under consideration prohibits its sale if "in imitation of yellow butter," though it may be sold "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." This prohibits its sale in its natural state of light yellow, or when colored a deeper yellow, because in either case it looks like butter. The statute is not limited to imitations made for a fraudulent purpose, that is, intentionally made to deceive. The act of Congress requiring, under penalty, oleomargarine to be sold only in designated packages, marked, stamped, and branded as prescribed, and numerous acts of Massachusetts, minutely providing against deception in that respect . . . amply protect the public from the danger of being induced to purchase oleo-

margarine for butter. The natural and reasonable effect of this statute is to prevent the sale of oleomargarine because it looks like butter. How this resemblance, although it might possibly mislead a purchaser, renders it any the less an article of commerce, it is difficult to see.

I deny that a state may exclude from commerce legitimate subjects of commercial dealings because of the possibility that their appearance may deceive purchasers in regard to their qualities.

In the language of Knowlton, J., in the dissenting opinion below, I am not "prepared to hold that no cloth whose fabric is so carded and spun and woven and finished as to give it the appearance of being wholly wool, when in fact it is in part cotton, can be a subject of commercial transactions, or that no jewelry which is not gold, but is made to resemble gold, and no imitations of precious stones, however desirable they may be considered by those who wish to wear them, shall be deemed articles of merchandise in regard to which Congress may make commercial regulations."

Other illustrations will readily suggest themselves. The concession involves a serious circumscription of the realm of trade and destroys the rule by an unnecessary exception.

The right to import, export, or sell oleomargarine in the original package under the regulations prescribed by Congress cannot be inhibited by such legislation as that before us. Fluctuation in decision in respect of so vital a power as that to regulate commerce among the several states, is to be deprecated, and the opinion and judgment in this case seem to me clearly inconsistent with settled principles. I dissent from opinion and judgment, and am authorized to say that MR. JUSTICE FIELD and MR. JUSTICE BREWER concur with me in so doing.

QUESTIONS

1. If Section 3243 of the Revised Statutes had not been incorporated into the act of 1886, would the decision of the court have been different?

2. Suppose an act of Congress of 1890 had prohibited the transportation in interstate commerce of artificially colored oleomargarine unless it was wrapped in separate one-pound packages plainly labeled "oleomargarine." Would the Massachusetts law have been sustained as applied to defendants complying with the Federal law?

3. Suppose the Federal statute authorized the sale anywhere in the United States of properly labeled oleomargarine artificially colored to resemble butter, provided it had been transported in interstate commerce and was sold in the original package. Would the Massachusetts law have been upheld?

44 GOVERNMENT AND RAILROAD TRANSPORTATION

4. Does the court successfully distinguish the principal case from *Leisy v. Hardin*?

5. Does the court successfully meet the arguments of the dissenting justices?

6. Can you suggest criteria for determining exactly how far a state may go in the exercise of the police power when it affects interstate commerce?

7. To what extent have the states exclusive power to pass police legislation directly affecting interstate commerce?

8. What is the difference between state police legislation which incidentally affects interstate commerce and state regulation of interstate commerce within the field of concurrent powers? Is it one of kind or of degree?

9. To protect owners of range cattle from fraud and theft, a Western state provides that no common carrier shall receive for transportation outside the state any hides that have not been inspected and tagged by a state inspector. Is this provision constitutional?

10. A state law provides that when a shipper shall demand in writing the number of cars to be furnished him within a certain number of days and shall deposit one fourth of the freight, a common carrier failing to furnish the cars shall forfeit twenty-five dollars a day for each car. Is this a violation of the Federal Constitution?

11. A state law forbids the heating by stoves or furnaces of all passenger cars within the state. Is a railroad engaged in interstate commerce liable for a violation of the act?

12. A state prohibits the importation and sale of cigarettes. D, a dealer who has purchased from a manufacturer who ships in boxes containing fifty small packages, is indicted for selling one of these packages. He pleads that the law is an interference with interstate commerce. Decide.

13. A state orders a railroad to remove a bridge to make important improvements in a drainage district possible. The railroad proves that the bridge is a necessary part of a line in interstate commerce. Must it obey?

14. A state law forbids the sale of fertilizing material unless it bears a stamp showing the name of the manufacturer and the chemical composition of the contents of the package. Is such a law constitutional?

15. A state law requires railroad companies to stop three regular trains daily, except Sunday, in every town with more than three thousand inhabitants. Is the law constitutional?

16. A state legislature requires all railroad engineers operating in the state to be examined by a state board and licensed. Is this a regulation of interstate commerce?

17. In which of the cases above, where you have decided in favor of the state law, could Congress pass an act superseding the law?

18. How far may a state go in taxing that part of an interstate carrier's property which is situated within the state?

19. The Pullman Palace Car Company, an Illinois corporation, has an average of five hundred cars constantly in service in Pennsylvania. A Pennsylvania law imposes a tax on the capital stock of all corporations doing business in Pennsylvania. In applying this to the Pullman Company, the proportion of its capital stock taxable in Pennsylvania was determined by taking the proportion between the car-miles covered by Pullman cars in the state to the total number of car-miles covered by its cars in the United States. Should the company pay the tax?

20. A state law forbids the operation of a motor vehicle as a common carrier of passengers for hire on public highways within a city or town unless a license is first obtained from the municipal authorities. Is a bus line doing both interstate and intrastate business bound to comply with the act in any way?

21. A state imposes a tax of one cent for each mile of highway traversed by motor vehicles used in interstate commerce, "as an excise on the use of the highway," and upon intrastate motor-bus companies a tax amounting to 3 per cent of their gross receipts (less local property taxes), the income from both taxes being used to maintain the highways. An interstate bus line complains that the first tax is unconstitutional. Decide.

22. A state levies upon the mining of iron ore an occupation tax equal to 6 per cent of the value of the ore produced during the previous year. D proves that practically all the product of his mines is loaded on cars at the mines and shipped out of the state. Is he liable to pay the tax?

23. A state levies upon all foreign corporations doing business within the state a franchise tax assessed at the rate of 3 per cent per annum upon the net income of the corporation gained in that state for the preceding year. Is the tax constitutional?

24. Practically all the anthracite mines in the United States are situated in Pennsylvania. That state imposes a tax of $1\frac{1}{2}$ per cent upon the value of each ton of anthracite when prepared for the market and ready for shipment. Is the tax constitutional?

25. Michigan passes a law requiring all lumber producers within the state to fill all orders from Michigan buyers before selling any lumber for use outside the state. Is the law constitutional?

26. Give ten examples of statutes passed in your state in the exercise of the police power which may incidentally affect interstate commerce but which, in your opinion, would stand regardless of any legislation of Congress under the commerce clause.

27. What economic conditions make it necessary for your state to have statutes incidentally affecting interstate commerce that differ from those of other states?

28. Has the need for such statutes increased or decreased in the last fifty years?

III. STATE REGULATION

[A¹]

Railroad regulation in the United States has thus far been confined within state limits. With the exception of . . . two measures . . . , not of a general regulative character, Congress has not undertaken to regulate the railroads engaged in interstate commerce. In many of the states, however, earnest efforts have been made to prevent and correct the abuses of railroad management by varying methods of regulation and with different degrees of success. The history of these efforts has never been written, and little has been known of them as a whole. Information in regard to them is not easily accessible, and even those best informed on the subject have been compelled to base their conclusions upon meager information or upon their knowledge of affairs in but a few states.

The lack of accurate information as to the methods of regulation which have been adopted in the several states, and as to the exact provisions of their enactments on the subject, and the difficulty of obtaining access to the multitude of session laws, reports, and documents in which such information lies buried, have prompted the committee, as a fitting preliminary to action in the same direction by Congress, as well as for the information of the public, to make as thorough an examination as time permitted of the railroad legislation of each state and territory in the Union, and to present in as compact form as possible a summary of their legislative enactments on the subject of railroad regulation, together with such information as was attainable in regard to the methods of regulation adopted and the results accomplished in those states in which action has been taken. . . .

The state railroad commissions, which are today a recognized factor in railway administration, have come into existence and prominence within the last ten or fifteen years, although there were so-called commissions at an earlier period. New York had a short-lived one in 1855, and after the Civil War several were created for a temporary purpose,

¹ Report of the Senate Select Committee on Interstate Commerce, Forty-ninth Congress, 1st session (1886), pp. 63-73.

distinct from regulation, such as that in Arkansas, which passed upon applications for state aid to railroads, and that in Tennessee, in 1870, which was authorized to sell or lease railroads in default to the state for loans. There are marked differences in the plan upon which the existing state commissions are organized. Of the older ones, those of the New England States, with the exception of Massachusetts and New Hampshire, form a distinct class by themselves, their duties being mainly limited to the inspection of the railway equipment and service.

Of an entirely different type were the commissions of the Western states, which owed their origin to the widespread "granger" movement. Whatever may be said of the character of the legislation inspired by that agitation, it certainly served a timely and useful purpose in its day, and substantial and beneficial results must be accredited to that popular uprising against the railroad corporations. Matters had reached such a pass that nothing short of the sturdy, forceful methods adopted in Illinois and in neighboring states could have allayed the gathering storm of public indignation which the then existing methods of management had aroused. But when, in the notable "granger cases," the United States Supreme Court upheld those methods and left the railroads at the mercy of the state legislatures, the corporations assumed a radically different attitude toward the community and toward the lawmaking power. They have since been more ready to recognize their public obligations, greater respect for public opinion is manifested, and in consequence the recommendations of the state commissions, which were at first contemptuously ignored, have since, as a rule, been complied with. This radical change of policy not adopted voluntarily, but prompted solely by motives of self-interest, has been taken advantage of by the state commissions with acknowledged favorable results, chief among which have been the cultivation of a better understanding and state of feeling between the railroads and the people, and a sufficient mitigation of the local abuses most prevalent to sensibly diminish the volume of complaint. . . .

The good results accomplished under the state commission system, the growing confidence of the people in that system as a means by which corporate abuses can best be restrained and regulated, and more general recognition of the important principle that the business of transportation requires special treatment for the proper adjustment of its relations to the citizen, are indicated in the fact that state after state has adopted the system, until commissions are now in operation

48 GOVERNMENT AND RAILROAD TRANSPORTATION

in twenty-four states and one territory. The following statement shows the states having commissions and the date in which commissions were first established in each state, arranged in the order of their establishment :

STATE	DATE	STATE	DATE	STATE	DATE
New Hampshire . .	1844	Wisconsin	1874	Alabama	1881
Connecticut . . .	1853	Minnesota	1874	New York	1882
Vermont	1855	Missouri	1875	Kansas	1883
Maine	1858	California	1876	Mississippi	1884
Ohio	1867	Virginia	1876	Nebraska	1885
Massachusetts . .	1869	Iowa	1878	Colorado	1885
Illinois	1871	South Carolina . .	1878	Dakota Territory .	1885
Rhode Island . . .	1872	Georgia	1879		
Michigan	1873	Kentucky	1880		

The Massachusetts commission furnishes the most conspicuous instance of the purely advisory commission, depending upon investigation, the justice of its conclusions, and the force of public opinion for the enforcement of its recommendations ; and by reason of its successful working under a novel plan and of the ability of its membership it has always made its influence widely felt. Since its establishment in 1869 its career has been closely watched, and its success is now undisputed. That it has not been due solely to fortuitous circumstances, or to its application to a limited local field, is indicated by the fact that the principle upon which it is organized has been successfully applied in other states and has been followed with satisfactory results in the state of New York, with its concentration of great and diverse railroad and commercial interests. . . .

The main features of the Massachusetts legislation, . . . may be briefly stated as follows :

Every railroad charter granted, with the possible exception of the Boston and Lowell corporation, which has never set up any privilege under its charter, is subject to the reserved right of the state to at pleasure alter, amend or repeal. This gives the state almost absolute power over every charter. It is also expressly enacted that all fares, tolls, and charges shall at all times be subject to revision or alteration by the legislature, or by officers appointed thereby. . . . This reserved power of the legislature, always existing, is none the less valuable because it does not have to be exercised more than once in ten years. There are three statutes upon which the commission depends. An early statute provided that railroads shall charge only reasonable rates,

giving a civil action for violation and a criminal process for a penalty. This also required *equal* rates to be given. Equal was held by the Supreme Court to mean *equitable* rates, and another statute was enacted which forbids any undue or unreasonable preference or advantage, or "any undue or unreasonable prejudice or disadvantage" against any party. What is just and what is unjust discrimination, between which a difference is recognized, is left to the determination of the commission and the courts.

The third statute, known as the short-haul law, has been the subject of so much discussion, that it is here given in full, as printed by the commissioners in their report of January, 1885, with their comments upon the law, as follows:

No railroad corporation shall charge or receive for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight *from the same original point of departure* to a station at a greater distance on its road *in the same direction*. Two or more railroad corporations whose roads connect shall not charge or receive for the transportation of freight to any station on the road of either of them a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight *from the same original point of departure* to a station at a greater distance on the road of either of them *in the same direction*. In the construction of this section the sum charged or received for the transportation of freight shall include all terminal charges; and the road of a corporation shall include all the road in use by it, whether owned or operated under a contract or lease. . . .

The short-haul law, as the text shows, applies to connecting roads and to freight of the same kind. To come under the law goods must be of the same kind, of the same quantity, must start from the same point, and must be going in the same direction over the same road. It does not contemplate that freight rates should be proportionate to mileage.

In addition to these general statutes, the physical condition of the roads is intrusted to the commission, the ordering of precautions, the regulation of crossings, the examination into the causes and prevention of accidents, and the terms upon which connecting roads shall take traffic from each other. Upon these matters the commission has positive power and gives decisions which a court would enforce.

Under another statute, whenever twenty citizens of a town apply to the selectmen or the city government and state any grievance against a road, they must look into the same, or petition the commission, or give a reason why they do not. In either case the question

50 GOVERNMENT AND RAILROAD TRANSPORTATION

reaches the board for investigation. The commission also investigates all complaints as to the location of stations or the lack of such accommodations. . . .

It will thus be seen that the most noticeable characteristic of the Massachusetts system is its simplicity. Its distinguishing feature is the very limited arbitrary power of the commissioners. They are given every facility and all the authority needed to obtain full information as to the actual operations of the railroads. With the opportunity thus afforded of ascertaining the actual facts as to any given matter of complaint, they are forced to sustain their position in every proceeding by making out a case that will stand the test of public criticism and carry conviction with it, whether the decision be in favor of the complaining citizen or of the defendant railroad. As Mr. Adams said in 1874, the commission was "simply a medium, a species of lens by means of which the otherwise scattered and powerless rays of public opinion could be concentrated to a focus and brought to bear upon any corporation."

The fact that during the fifteen years of its existence every decision of the commission on the many complicated questions as to rates and discriminations that have arisen has vindicated and enforced itself without resort to the courts . . . , must be regarded as satisfactory evidence that the system has proved effective where it has been most thoroughly tested. . . .

In the way of practical results the Massachusetts commission is shown by its record and by the testimony to have exercised by its reports and decisions an acknowledged influence upon railroad managers in bringing about needed reforms, and to have been successful in the redress of grievances and the correction of abuses. It has held the railroads to obedience to the laws, and has not only secured the passage of needful legislation, but prevented unwise measures. Through its recommendations voluntary reductions in rates have been made and discriminations of different kinds done away with. It has secured uniformity in the accounts and reports of the roads. It has fixed the responsibility of accidents and done great service in requiring the adoption of improved appliances for safety. . . .

The Illinois commission has been the leading exponent of the other theory of regulation through a commission, and is next considered to bring the two systems into contrast and because the Illinois legislation has been followed in a number of states. It was inaugurated by the

adoption of the constitution of 1870, now in force, which declared railways to be public highways, and free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. The general assembly is required to pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight; to correct abuses and prevent unjust discrimination and extortion; and to enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of the property and franchise of the railways. The consolidation of railroad companies owning parallel or competing lines is prohibited, and sixty days' public notice of all proposed consolidations is required.

In compliance with these requirements, the act of 1871 created the railroad and warehouse commission, consisting of three commissioners appointed by the governor, and subject to removal at his discretion. Their term of office is two years. No person connected with, interested in, or employed by any railroad company or warehouseman shall be eligible to such appointment. They give bonds in the sum of \$20,000, are paid \$3500 per annum by the state, and have the right to pass free over all the railroads of the state in the performance of their duties. Annual reports under the oath of the proper officers are required from every railroad and warehouse, the act specifying in detail what such reports shall contain.

The commissioners are required to examine into the conditions and management of the railroads and warehouses, and to prosecute all violations of the laws relating to them which come to their knowledge. They are authorized upon hearing, to cancel the license of any public warehouseman found guilty by them of violating the law. They are given authority to examine the property, books, and records of all railroad companies and warehousemen, and to examine their officers and employees under oath. In making investigations they can compel the attendance of witnesses by the aid of the circuit courts, the penalty for refusing to appear and testify being a fine of from \$25 to \$500, or imprisonment for thirty days, or both. The penalty for failing to make the reports required or for obstructing the commissioners in the discharge of their duties is a fine of \$100 to \$5000, with a like penalty for every ten days of willful refusal. The attorney-general and the state's attorneys of the respective counties are required to prosecute all suits and proceedings directed by the commissioners.

52 GOVERNMENT AND RAILROAD TRANSPORTATION

There were other provisions forbidding any discrimination whatever, under any circumstances, but these were declared unconstitutional by the supreme court of the state, because the act failed to recognize the distinction between discrimination and unjust discrimination, but prohibited discriminations of any character, and because it did not allow the companies to explain the reason of the discrimination. Accordingly the next legislature, in 1873, passed the amendatory act now in force, which defines and prohibits extortion and unjust discrimination, makes discriminating charges *prima facie* evidence of unjust discrimination, and fixes the penalties at a fine from \$1000 to \$5000 for the first offense, \$5000 to \$10,000 for the second, and \$10,000 to \$20,000 for the third offense, and makes the company liable to a fine of \$25,000 for each subsequent conviction. Persons damaged by such charges may also recover triple damages, with costs of suit and attorney's fee. It is made the duty of the commissioners to make, for each railroad doing business in the state, a schedule of reasonable maximum rates, which schedule shall in all suits against such railroads be deemed and taken by the courts as *prima facie* evidence that the rates therein fixed are reasonable. This changed the rule of evidence so that, if the railroad charged more than the maximum rate, and the case was taken into court, the burden of proof was thrown upon the railroad, which was compelled to prove such charge a reasonable one, instead of the people being compelled to prove it an unreasonable one.

Under this act separate schedules for each road were prepared, but since 1881 the roads have been divided into two groups, with but two schedules, a slightly higher rate being fixed for the less prosperous and least favorably situated roads. The railroads did not accept the rates prescribed, and litigation ensued all over the state. The contest was a memorable one, and it was not until 1880, six years later, that the validity of this legislation was finally determined. Meantime a notable victory was achieved and the final outcome of the contest foreshadowed, when the United States Supreme Court, in 1877, decided the Munn case and affirmed that part of the legislation regulating the warehousing and inspection of grain.

The membership of the board was changed in 1877, and the new commissioners were prompt to make the most of the changed attitude assumed by the corporations after the warehouse decision. While awaiting the final determination of their authority by the courts, they put in practice the Massachusetts principle of arbitration, believing it useless to indefinitely multiply the number of suits instituted. . . .

This policy has been since continued, and without any modification of the law has become a recognized feature of the Illinois system, which thus combines the principle upon which the Massachusetts commission has operated with perhaps the most stringent railroad legislation in the United States.

As to general results, the Illinois legislation must be credited with contributing largely to the memorable triumph over the corporations achieved in the "Granger" decisions. As to the work of the commission within the state, it is in evidence that the rates prescribed in 1881 made an average reduction of about 30 per cent upon those of 1874. This schedule was accepted by all the roads in the state, and became the standard of the charging rates. This was not wholly due to legislation, for there had been a considerable voluntary reduction of rates since 1874, but the commission must be credited with having secured a substantial reduction in the rates charged at noncompeting points. At these points the roads charge the maximum rates allowed, and it is at such points, which are otherwise without protection, that the benefits of this legislation are most apparent. It is also shown that with a largely increased mileage and volume of business there has been a steady decrease in the receipts per mile of the roads on their business in Illinois, showing a constant reduction in rates, and that the average rates prevailing in Illinois have been lower than in the adjoining states.

It is also in evidence that the roads are complying with the law and the regulations of the commission, and that, since 1877, the commission has brought about more harmonious relations between the corporations and the people, but it is not claimed that the law, or the system of fixing rates, is in all respects satisfactory. In the report of 1882, the following suggestion was made:

The commission has found some difficulty in doing complete justice in many cases coming before the board, owing to the mandatory and inflexible character of certain provisions of the law, as, in the case of all statutory enactments, instances will arise where justice between the parties can be better accomplished by relaxing the more rigid rules of the law; and we are of the opinion that this statute could be better administered, and justice better insured, if some amendments were made, rendering certain of its provisions more flexible, and giving the commission greater discretionary powers. . . .

[B]

Stone *v.* Farmers' Loan and Trust Company

United States Supreme Court (1886), 116 U.S. 307

This was a suit brought by the Farmers' Loan and Trust Company, a New York corporation, to enjoin the Railroad Commission of Mississippi from enforcing against the Mobile and Ohio Railroad Company the provisions of the statute of Mississippi passed March 11, 1884, entitled "An Act to Provide for the Regulation of Freight and Passenger Rates on Railroads in this State, and to Create a Commission to Supervise the Same, and for Other Purposes." . . .

[The provisions of the Mississippi act are of the same general nature as those of the act creating the Illinois Commission, which is described under *A*, *supra*.]

On the third of February, 1848, the legislature of Alabama passed an act to incorporate the Mobile and Ohio Railroad Company, with power "to locate, construct, and finally complete a single, double, or treble railroad or way from some suitable point in the city of Mobile, in a westerly or northwesterly direction, to the west line of this state, towards the mouth of the Ohio River, on such route as shall be deemed most expedient; and to transport, take, and carry property and persons upon said railroad or way by the power and force of steam, of animals, or of any other mechanical or other power, or any combination of them which said company may choose to apply"; and "with permission to make any lawful contract with any other railroad corporation in relation to the business of said company, and also to make joint stock with any other railroad corporation."

The immediate government and direction of the affairs of the company were vested in a board of directors to be chosen by the stockholders, and by section 7 it was provided:

That the directors shall have full power to make and prescribe such by-laws, rules, and regulations as they shall deem needful and proper, touching the disposition and management of the stock, property, estate, and effects of said company, not contrary to this charter or the laws of this state or of the United States; the transfer of shares, the duties and conduct of their officers and servants, touching the election of and meeting of the directors; and all matters whatsoever which may appertain to the concerns of said company.

Section 12 was as follows :

SECTION 12. And be it further enacted, That it shall be lawful for the company hereby incorporated from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation of persons or property on their railroad, or way aforesaid, hereby authorized to be constructed, erected, built, or used, or upon any part thereof.

On the 17th of February, 1848, the legislature of Mississippi passed "An act to incorporate the Mobile and Ohio Railroad Company." This act, after reciting the incorporation of the company in Alabama, and setting out that act of incorporation in full, "the same as printed in Alabama," and also reciting that Mississippi was "desirous to aid in accomplishing the object of the said act," proceeded as follows :

SECTION 1. Be it enacted by the Legislature of the State of Mississippi, That the railroad described in the above-recited act be extended in the State of Mississippi, from the Alabama line to the State of Tennessee, in such direction and on such a route as shall be deemed most expedient ; and that as to said extension there is granted to the said Mobile and Ohio Railroad Company, when organized, the same rights, powers, and privileges as are granted to it within the State of Alabama by the same act, subject, however, to the same and similar conditions, restrictions, modifications, and provisions as are in said act above recited, contained, and set forth, excepting the provision contained in Section 15 of said act ; and the said act is hereby concurred in and adopted within the State of Mississippi in reference to the said railroad as extended, and in reference to the said Mobile and Ohio Railroad Company, with the exception of that portion contained in Section 15, as before stated : *Provided*, That in case of persons absent or unknown, whose lands may be condemned pursuant to Sections 7, 8, and 9 of said recited act, the placing of the amount of the damages assessed to the credit of the owner, in the hands of the state treasurer, shall be taken as payment ; and on such owner appearing or tendering satisfactory evidence of his claims thereto, such damages shall be paid him by the treasurer on the warrant of the auditor of public accounts.

The excepted section related to taxation, and as to this a different provision was made in Mississippi from that in the Alabama charter. Power was also given the company to cross the tracks of other railroads in Mississippi, and some slight changes were made in the provision for depositing the amount of damages assessed upon the condemnation of property for the use of the company. Otherwise the charters of the company in these two states were substantially identical. . . .

The case was heard on demurrer to the bill. The circuit court rendered a decree allowing the injunction, and from that decree this appeal was taken.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. After stating the facts in the language above reported, he continued :

The argument in support of the decree below is :

1. That the statute under which the commissioners are to act impairs the obligation of the charter contract of the Mobile and Ohio Railroad Company ;

2. That it is, so far as that company is concerned, a regulation of commerce among the states ;

3. That it denies the company the equal protection of the laws and deprives it of its property without due process of law ;

4. That it confers both legislative and judicial powers on the commission, and is thus repugnant to the constitution of Mississippi ; and

5. That it is void on its face by reason of its inconsistencies and uncertainties.

These several positions will be considered in their order.

1. The provisions of the charter on which the claim of contract rests are found in §§ 1, 7, and 12, as follows :

SECTION 1. And the said company is hereby authorized and empowered . . . to transport, take, and carry property and persons upon said railroad or way by the power and force of steam, of animals, or of any other mechanical or other power, or any combination of them which the company may choose to apply. . . .

[Sections 7 and 12 are quoted on pages 54-55, *supra*.]

From this it is claimed that the state granted to the company, for the full term of its corporate existence, that is to say, forever, the right of managing its own affairs and regulating its charges for the transportation of persons and property, free of all legislative control.

It is now settled in this court that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. . . . This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in *Providence Bank v. Billings*, 4 Pet. 514, 561, "Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear." This

rule is elementary, and the cases in our reports where it has been considered and applied are numerous. . . .

Such being the rule, and such its practical operation, we return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and its privileges in its business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be. . . .

Next follows the power of the directors to make by-laws, rules, and regulations for the management of the affairs of the company, but it is expressly provided that such by-laws, rules, and regulations shall not be contrary to the laws of the state. This we held in *Ruggles v. Illinois*, 108 U.S. 526, included laws in force when the charter was granted, and those which came into operation afterwards as well. It is true that the clause which thus limits the power of the directors is found in the middle of the sentence which confers the power, but it clearly was intended to refer to everything that might be done in this way "touching . . . all matters whatsoever that may appertain to the concerns of said company." There is nothing here, therefore, which in any manner implies a contract on the part of the state to exempt the company from the operation of laws enacted within the scope of legislative power for the regulation of the business in which it is authorized to engage.

The case turns consequently on Section 12, which is, "that it shall be lawful for the company . . . from time to time to fix, regulate, and receive the toll and charges by them to be received for transportation," etc. This would have been implied from the rest of the charter if there had been no such provision, and it is argued that, unless it had been intended to surrender the power of control over fares and freights, this section would not have been inserted. The argument concedes that the power of the company under this section is limited by the rule of the common law which requires all charges to be reasonable. In *Munn v. Illinois*, 94 U.S. 113, and *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 94 U.S. 155, this court decided that, as to natural persons and corporations subject to legislative control, the state could, in cases like this, fix a maximum beyond which any charge would be unreasonable, and that such maximum when fixed would be binding on

the courts in their adjudications, as well as on the parties in their dealings. The claim now is that by Section 12 the state has surrendered the power to fix a maximum for this company, and has declared that the courts shall be left to determine what is reasonable, free of all legislative control. We see no evidence of any such intention. Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was. Consequently, all the power which the state had in the matter before the charter it retained afterwards. The power to charge being coupled with the condition that the charge shall be reasonable, the state is left free to act on the subject of reasonableness within the limits of its general authority as circumstances may require. The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention.

This is not in conflict with the judgment of the supreme court of Mississippi in *Railroad Commission v. Yazoo & Mississippi Railroad Co.*, in which it was decided that the power had been surrendered in favor of that company because in that charter a maximum of rates was fixed. In the opinion, a copy of which has been furnished us in advance of its publication in the regular series of reports, the court says distinctly that "a grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation, which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere can be denied." In *Railroad Commission v. Natchez, Jackson & Columbia Railroad Co.* it was held by the same court that the charter authority for the company "from time to time to fix, regulate, and receive tolls and charges by them to be received for transportation of persons and property," did not amount to a contract of exemption, and the commission was allowed to proceed under the law.

From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to

regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides "that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

It is also claimed that the charter contains a contract binding the state to allow the company, at all times and in all ways, to manage its own affairs through its own board of directors, and that the obligation of this contract will be impaired if the provisions of the statute are enforced by the commissioners. As has already been seen, the power of the directors is coupled with a condition that their management shall be in accordance with the laws of the state. This undoubtedly means with such laws as may be constitutionally enacted touching the administration of the affairs of the company. The present statute requires the company (1) to furnish the commissioners with copies of its tariffs for all kinds of transportation; (2) to post in some conspicuous place at each of its depots the tariff approved by the commissioners, with the certificate of approval attached; (3) to conform to the tariff as approved without discrimination in favor of or against persons or localities; (4) to furnish the commissioners with all the information they require relative to the management of its line, and particularly with copies of all leases, contracts, and agreements for transportation with express, sleeping-car, or other companies to which they are parties; (5) to report all accidents within the limits of the state attended with any serious personal injury; (6) to make quarterly returns of its business to the commissioners, which returns shall embrace all the receipts and expenditures of its railroad; (7) to provide at least one comfortable and suitable reception room at each depot for the use and accommodation of persons desiring or awaiting transportation over its road; and (8) to keep at all times in such reception rooms a bulletin board which shall show the time of the arrival and departure of trains, and when any passenger or other train transporting passengers is delayed, notice of the extent of the delay and the probable time of arrival as near as it can be ascertained.

The second and third of these requirements relate only to the duty of the company to keep its charges within the limit of the tariff approved by the commissioners without discrimination in favor of or against persons or localities. The first, fourth, and sixth are clearly intended as a means of furnishing the commissioners with the information necessary to enable them to act understandingly in fixing the tariff. Whether under the provisions the company can be required to make a report of or give information about its business outside of Mississippi is a question we do not now undertake to decide. The second, fifth, seventh, and eighth are nothing more than reasonable police regulations for the comfort, convenience, and safety of those traveling upon the road or doing business with the company in the state.

The commissioners have power (1) to approve, and if need be to fix the tariff of charges for transportation, both of persons and property, by which the company must be governed, and to exercise a watchful and careful supervision over such tariff; (2) to notify the company of the times and places when and where the propriety of a change in existing tariffs will be considered; (3) to entertain complaints made by any person against a tariff which has been approved, on the ground that the same is in any respect for more than a just compensation, or that the charges amount to or operate so as to effect unjust discrimination, and, after due notice to the company and proper inquiry had, to make any changes that may be deemed proper; (4) to repair to the scene of an accident within the state attended with serious personal injury, and inquire into the facts and circumstances thereof, to be recorded in the minutes of their proceedings and embraced in the annual report they are required to make to the governor for transmission to the legislature; (5) to inspect the depots of all railroads operated in the state and to see that comfortable and suitable reception rooms are provided; and (6) to institute all necessary suits for the recovery of the penalties prescribed by the statute for a violation of its provisions. The first three of these relate entirely to proceedings for fixing charges and supervising the tariff, and the rest, like the correlative requirements of the company, are mere police regulations which the commissioners are to enforce. All this comes clearly within the supervising power of the state in the administration of the affairs of its domestic corporations.

We conclude, therefore, that the charter of the company contains no contract the obligation of which is in any way impaired by the statute under which the commissioners are to act.

2. There can be no doubt that each of the states through which the Mobile and Ohio Railroad passes incorporated the company for the purpose of securing the construction of a railroad from Mobile, through Alabama, Mississippi, Tennessee, and Kentucky, to some point near the mouth of the Ohio River, where it would connect with another railroad to the lakes, and thus form a continuous line of interstate communication between the Gulf of Mexico in the south, and the Great Lakes in the north. It is equally certain that Congress aided in the construction of parts of this line of road so as to establish such a route of travel and transportation. But it is none the less true that the corporation created by each state is for all the purposes of local government a domestic corporation, and that its railroad within the state is a matter of domestic concern. Every person, every corporation, everything within the territorial limits of a state is while there subject to the constitutional authority of the state government. Clearly under this rule Mississippi may govern this corporation, as it does all domestic corporations, in respect to every act and everything within the state which is the lawful subject of state government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi. So it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its trains at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and time-tables at proper places, and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others. This company is not relieved entirely from state regulation or state control in Mississippi simply because it has been incorporated by, and is carrying on business in, the other states through which its road runs. While in Mississippi it can be governed by Mississippi in respect to all things which have not been placed by the Constitution of the United States within the exclusive jurisdiction of Congress, that is to say, using the language of this court in *Cardwell v. Bridge Co.*, 113 U.S. 205, 210, "when the subjects on which it is exerted are national in their character, and admit and require uniformity of regulations affecting alike all the states." Under this

rule nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company or impair the usefulness of its facilities for interstate traffic. It is not enough to prevent the state from acting that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the state as well as within.

The Commission is in express terms prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of persons or property taken up without the state and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the state over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress, and the general powers of the state in this particular, is not everywhere distinctly marked, and it is always easier to determine when a case arises whether it falls on one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the state which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond.

3. General statutes regulating the use of railroads in a state, or fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not necessarily deprive the corporation owning or operating a railroad within the state of its property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States, or take away from the corporation the equal protection of the laws. *Munn v. Illinois*, 94 U.S. 113, 134, 135; *Railroad Co. v. Richmond*, 96 U.S. 521, 529; *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354. The great purpose of the statute now under consideration is to fix a maximum of charges, and to regulate in some matters of a police nature the use of railroads in the state. In its general scope it is constitutional, and it applies equally to all persons or corporations owning or operating rail-

roads in the state. No preference is given to one over another, but all are treated alike. Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commissioners from giving it any effect whatever as against this company.

4. The supreme court of Mississippi has decided in the cases of *Railroad Commission v. Yazoo & Mississippi Railroad Company*, and *Railroad Commission v. Natchez, Jackson & Columbia Railroad Company*, not yet officially reported, that the statute is not repugnant to the constitution of the state "in that it creates a commission and charges it with the duty of supervising railroads." To this we agree, and that is all that need be decided in this case. As was said by the supreme court of Mississippi, in the case first referred to above: "Many questions may arise under it not necessary to be disposed of now, and we leave them for consideration when presented."

5. It is difficult to understand precisely on what ground we are expected to declare that this statute is so inconsistent and uncertain as to render it absolutely void on its face. The statute of Tennessee which was under consideration in *Louisville & Nashville Railroad Company v. Railroad Commission of Tennessee*, 19 Fed. Rep. 679, is materially different from this in many respects. That case was decided before this statute was passed, and it is not unlikely that the legislature of Mississippi made use of the decision in framing their bill so as to avoid some, if not all, of the objections which, in the opinion of the court, were fatal to what had been done in Tennessee. The argument on this branch of the controversy contains much that might have been useful if addressed to the legislature while considering the bill before its final enactment, but we find nothing in it to show that the statute as it now stands is altogether void and inoperative. When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid.

The decree of the circuit court is reversed and the cause remanded, with instructions to dismiss the bill.

[C]

*Some of the Difficulties of Effective State Regulation*¹

Any absolute or comprehensive regulation of the railroad system of the United States would include the official supervision of every step taken from the granting of a charter, and the selection of a route on through all the financial operations incidental to the organization of a company and the construction of the line, and of the policy pursued by the management after the road begins business. While ample authority for such thorough supervision unquestionably exists, the powers of the states and of the general government are so divided as to make it difficult, if not impracticable, to secure a uniform system of regulation applicable alike in all the details mentioned to the entire system. The states have chartered the railroads of the United States, and there can be no assurance of concert of action among them, or of any degree of uniformity in their legislation, with respect to the granting of charters or the control of the financial operations of such corporations when organized. It was with this difficulty in view that Mr. Simon Sterne made the following suggestion :

I recognize the difficulty, and perhaps, for the purpose of meeting that question, sooner or later we shall have to pass a constitutional amendment to clothe the general government with the exercise of the power of eminent domain within the several states, for the purpose of chartering interstate lines and assigning to existing state lines fields, and probably, without such a constitutional amendment, whatever exercise of power Congress may see fit to put forth may be challenged, and probably will be challenged, in the courts, as an impairment of the rights of the states ; but it is well to recognize a difficulty which presents itself on the outset of the question, for the purpose of seeing whether what we are doing is not merely a tentative measure until we can produce more far-reaching and wider results by changes in the organic law.

The fundamental difficulties arising from the constitutional organization of our dual system of state and national government preclude the possibility of effective and satisfactory regulation of the business of transportation by the states alone. The difficulty occasioned by this division of power and jurisdiction between the states and the general government is encountered at every step taken when an attempt is made to devise a plan of regulation. Nevertheless, while the solution of the railroad problem might be greatly facilitated by the giving of

¹ Report of the Senate Select Committee on Interstate Commerce, Forty-ninth Congress, 1st Session (1886), pp. 43-45.

exclusive jurisdiction over all the operations of the entire railroad system to the general government, there is no occasion to consider the necessity of a constitutional amendment until it has been demonstrated by actual trial that the powers now possessed by Congress cannot be exercised effectively. . . .

The courts have pointed out the impracticability of allowing each state to impose such restrictions as it pleased upon the commerce passing into, through, or beyond its borders, and have confined the jurisdiction of the state's authority to the commerce originating and terminating within its own domain, that which is strictly domestic. Commerce must be state or interstate, and either can be subject to but one jurisdiction and set of regulations. This is evidently the only safe rule. The disastrous effects of any other construction need not be enlarged upon.

In the exercise of their undoubted right to regulate, the states have been hampered with their inability to apply their regulations to interstate commerce, which comprises, in most instances, the greater portion of the business transacted within their borders by railroads. The essence of the effective regulation of business transactions is equality and uniformity, and this is impossible as to two transactions alike in every other respect when one reaches across a state line and the other does not. In the controversies that naturally arose over these questions in different states, as the records of the courts demonstrate, the railroad companies have not hesitated at every opportunity to insist upon and take advantage of the exclusive power of Congress to regulate interstate commerce. And, on the other hand, the records of Congress show that they have been equally swift to maintain and to deprecate interference with the rights of the states whenever national regulation has been proposed. With its authority restricted to less than half of the business operations of the transportation companies subject to its jurisdiction, the obstacles encountered by a state in the exercise of a satisfactory supervision over the railroads engaged in business within its borders and in the administration of equal justice to all its citizens who might use them are apparent. When these difficulties, with all the opportunities they present for evasion, of the state's authority, are understood, it is not a matter of wonder that the various state commissions should fail to accomplish all that has been expected of them, but it is rather a matter of surprise that they should have succeeded in bringing about the beneficial results which are acknowledged as a result of their labors. . . .

66 GOVERNMENT AND RAILROAD TRANSPORTATION

QUESTIONS

1. During what period were most of the state commissions established that existed before the Interstate Commerce Commission?
2. What economic conditions contributed to their formation?
3. What was the "Granger" movement?
4. Contrast the powers and duties of the early Massachusetts and early Illinois commissions.
5. How effective can a purely advisory commission be? Upon what will its success largely depend?
6. Do you know of any commissions with purely advisory powers that regulate certain business activities at present?
7. From what source do interstate railroads derive their charters?
8. On what powers of the state of Mississippi did its creation of a railroad commission rest?
9. If the railroad's charter in the Mississippi case had given to the road exclusive power to fix rates, would the legislature of the state have been able to control rates through the creation of a railroad commission or by other means?
10. What businesses other than railroads may have their charges fixed by governmental regulation?
11. Is there any limit to the government's power to regulate the prices to be charged by business organizations?
12. Is it good business policy to allow political appointees rather than railroad officials to fix rates?
13. To what extent was regulation of the railroads by the states desirable?
14. With what difficulties did state railroad commissions meet? What are the limitations of their powers?
15. By 1886 what further method of railroad regulation was deemed necessary? Why?

IV. FEDERAL REGULATION

A. ECONOMIC AND POLITICAL CAUSES

[A¹]

The Causes of Complaint against the Railroad System

The complaints against the railroad system of the United States expressed to the committee are based upon the following charges :

1. That local rates are unreasonably high, compared with through rates.

2. That both local and through rates are unreasonably high at non-competing points, either from the absence of competition or the consequence of pooling agreements that restrict its operation.

3. That rates are established without apparent regard to the actual cost of the service performed, and are based largely on "what the traffic will bear."

4. That unjustifiable discriminations are constantly made between individuals in the rates charged for like service under similar circumstances.

5. That improper discriminations are made between articles of freight and branches of business of a like character, and between different quantities of the same class of freight.

6. That unreasonable discriminations are made between localities similarly situated.

7. That the effect of the prevailing policy of railroad management is, by an elaborate system of secret special rates, rebates, drawbacks, and concessions, to foster monopoly, to enrich favored shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor.

8. That such favoritism and secrecy introduces an element of uncertainty into legitimate business that greatly retards the development of our industries and commerce.

¹ Report of the Senate Select Committee on Interstate Commerce, Forty-ninth Congress, 1st Session (1886), pp. 180-182.

68 GOVERNMENT AND RAILROAD TRANSPORTATION

9. That the secret cutting of rates and the sudden fluctuations that constantly take place are demoralizing to all business except that of a purely speculative character, and frequently occasion great injustice and heavy losses.

10. That, in the absence of national and uniform legislation, the railroads are able by various devices to avoid their responsibility as carriers, especially on shipments over more than one road, or from one State to another, and that shippers find great difficulty in recovering damages for the loss of property or for injury thereto.

11. That railroads refuse to be bound by their own contracts, and arbitrarily collect large sums in the shape of overcharges in addition to the rates agreed upon at the time of shipment.

12. That railroads often refuse to recognize or be responsible for the acts of dishonest agents acting under their authority.

13. That the common law fails to afford a remedy for such grievances, and that in cases of dispute the shipper is compelled to submit to the decision of the railroad manager or pool commissioner, or run the risk of incurring further losses by greater discriminations.

14. That the differences in the classifications in use in various parts of the country, and sometimes for shipments over the same roads in different directions, are a fruitful source of misunderstandings, and are often made a means of extortion.

15. That a privileged class is created by the granting of passes, and that the cost of the passenger service is largely increased by the extent of this abuse.

16. That the capitalization of bonded indebtedness of the roads largely exceeds the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued.

17. That railroad corporations have improperly engaged in lines of business entirely distinct from that of transportation, and that undue advantages have been afforded to business enterprises in which railroad officials were interested.

18. That the management of the railroad business is extravagant and wasteful, and that a needless tax is imposed upon the shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents engaged in a reckless strife for competitive business.

The Essence of the Complaints

It will be observed that the most important, and, in fact, nearly all, of the foregoing complaints are based upon the practice of discrimination in one form or another. This is the principal cause of complaint against the management and operation of the transportation system of the United States, and gives rise to the questions of greatest difficulty in the regulation of interstate commerce.

It is substantially agreed by all parties in interest that the great desideratum is to secure equality, so far as practicable, in the facilities for transportation afforded and the rates charged by the instrumentalities of commerce. The burden of complaint is against unfair differences in these particulars as between different places, persons, and commodities, and its essence is that these differences are unjust in comparison with the rates allowed or facilities afforded to other persons and places for a like service under similar circumstances. . . .

[B¹]

The Necessity of National Regulation of Interstate Commerce

The two propositions which the committee has kept prominently in view throughout the entire investigation have been whether any legislation for the regulation of interstate transportation is necessary or expedient, and, if so, in what manner can the public interest be best subserved by legislation on that subject.

The consideration of the first proposition may seem to be a work of supererogation, for it is the deliberate judgment of the committee that upon no public question are the people so nearly unanimous as upon the proposition that Congress should undertake in some way the regulation of interstate commerce. Omitting those who speak for the railroad interests, there is practically no difference of opinion as to the necessity and importance of such action by Congress, and this is fully substantiated by the testimony accompanying this report, which is a fair consensus of public sentiment upon the question. The committee has found among the leading representatives of the railroad interests an increasing readiness to accept the aid of Congress in working out the solution of the railroad problem which has obstinately baffled all their efforts, and not a few of the ablest railroad men of the country

¹ Report of the Senate Select Committee on Interstate Commerce, Forty-ninth Congress, 1st Session (1886), pp. 175-180.

70 GOVERNMENT AND RAILROAD TRANSPORTATION

seem disposed to look to the intervention of Congress as promising to afford the best means of ultimately securing a more equitable and satisfactory adjustment of the relations of the transportation interests to the community than they themselves have been able to bring about.

The evidence upon this point is so conclusive that the committee has no hesitation in declaring that prompt action by Congress upon this important subject is almost unanimously demanded by public sentiment.

This demand is occasioned by the existence of acknowledged evils incident to and growing out of the complicated business of transportation as now conducted, evils which the people believe can be checked and mitigated, if not wholly remedied, by appropriate legislation. The committee recognizes the justice of this demand, and believes that action by Congress looking to the regulation of interstate transportation is necessary and expedient, for the following reasons :

1. The public interest demands regulation of the business of transportation because, in the absence of such regulation, the carrier is practically and actually the sole and final arbiter upon all disputed questions that arise between shipper and carrier as to whether rates are reasonable or unjust discrimination has been practiced.

It is argued by railroad representatives that arbitrary or oppressive rates cannot be maintained ; that they are adjusted and sufficiently regulated by competition with rival roads and with water routes, by commercial necessities, by the natural laws of trade, and by that self-interest which compels the corporations to have due regard to the wants and the opinions of those upon whom they must depend for business ; that such discriminations as exist are for the most part unavoidable ; that the owners and managers of the property are the best judges of the conditions and circumstances that affect the cost of transportation and should determine the compensation they are entitled to receive ; and that, in any event, the common law affords the shipper an adequate remedy and protection against abuse or any infringement of his rights.

This answer fails to recognize the public nature and obligations of the carrier, and the right of the people, through the governmental authority, to have a voice in the management of a corporation which performs a public function. Nor do the facts warrant the claim that competition and self-interest can be relied upon to secure the shipper against abuse and unjust discrimination, or that he has an available and satisfactory remedy at common law.

If it is found that the common law and the courts do not, in fact, afford to the shipper an effective remedy for his grievances, we have no need to inquire to what extent grievances may exist. The complicated nature of the countless transactions incident to the business of transportation make it inevitable that disagreements should arise between the parties in interest, and it is neither just nor proper that disputed questions materially affecting the business operations of a shipper should be left to the final determination of those representing an opposing financial interest. When such disagreements occur the shipper and the carrier alike are entitled to a fair and impartial determination of the matters at issue, and by all the principles governing judicial proceedings the most fair-minded railroad official is disqualified by his personal interest in the result from giving such a determination. If, however, there existed an impartial tribunal to which the shipper could readily appeal, he would find less occasion for appealing from the decision of the carrier, and the differences between shipper and carrier would be more likely to be adjusted amicably without such an appeal.

The simple fact that the shipper is now obliged to submit to the adjudication of his complaint by the other party in interest, the party by whom he supposes himself to have been aggrieved, is in itself sufficient to demonstrate the necessity of such legislation as will secure to the shipper that impartial hearing of his complaints to which he is entitled by all the recognized principles of justice and equity.

Evidence is not wanting to prove that the remedy at common law is impracticable and of little advantage to the ordinary shipper. It has been found so by the people of the states in dealing with their local traffic, and, as has been shown, their recognition of the fact has been authoritatively recorded in nearly every state in the Union by statutory enactments, and in many of them by the establishment of commissions, in the effort to provide for the shipper that prompt and effective remedy which it has been found by experience that recourse to the common law has failed to afford. The reasons for this failure apply with even greater force to the more complicated transactions of interstate commerce than to state traffic, because the former involve more perplexing questions and are affected by a greater diversity of varying conditions. The legislation of the states, the reports of the state commissions, the records of the courts, the evidence of shippers, and, in short, the whole current of testimony, is to the same effect ;

72 GOVERNMENT AND RAILROAD TRANSPORTATION

and the fact stated is also admitted by some of the highest railroad authorities. Mr. Fink says :

In many cases where small amounts are involved, which do not justify legal proceedings against the company, the aggrieved parties are prevented from prosecuting their claims. . . . Ordinary courts are not properly constituted for that purpose, and the time required for the adjudication of claims is so long and the expenses so great as to defeat the very object for which proceedings are instituted.

Leaving out of consideration the natural disinclination of the average shipper to engage in litigation with a corporation which may have the power to determine his success or failure in business, and to enter the lists against an adversary with ample resources and the best legal talent at its command and able to wear out an opponent by the tedious delays of the law, it is plain that the shipper is still at a great disadvantage in seeking redress for grievances under the common law, which places upon the complainant the burden of proof and requires him to affirmatively establish the unreasonableness of a given rate or the fact of an alleged discrimination. . . .

All these considerations, fully corroborated as they are by the evidence submitted, have satisfied the committee that the common law wholly fails to afford an effective remedy against unreasonable or discriminating rates, and that, without additional legislation, the carrier is practically the sole and only judge of the rights of the producer and shipper in respect to transportation.

2. It is the duty of Congress to undertake the regulation of the business of transportation, because of admitted abuses in its management and acknowledged discriminations between persons and places in its practical operation — evils which it is possible to reach and remedy only through the exercise of the powers granted by the Constitution to Congress, and against which the citizen is entitled to the protection and relief the national authority can alone afford. . . .

It is perhaps only necessary to suggest here that the railroad argument against legislation on the ground that competition, the laws of trade, and an "enlightened self-interest" afford all needful protection and the most effective regulation, is predicated upon the conditions which prevail at the great commercial centers and in favored localities where competition is most active, and applies more particularly to the larger shippers, who are always able to take care of themselves and at such points can usually depend for protection and fair treatment upon the eagerness of the corporations to capture all the business possible.

But it should be the aim of the law to protect the weak, and it is at the great number of noncompetitive interior points, scattered all over the land, at which even the protection elsewhere afforded by competitive influences is not found, and where the producer and shipper are most completely in the power of the railroads, that additional safeguards are most needed.

3. National legislation is necessary to remedy the evils complained of, because the operations of the transportation system are, for the most part, beyond the jurisdiction of the states, and, until Congress acts, not subject to any governmental control in the public interest.

The states have no power to regulate interstate commerce, and it appears from the evidence that even their control of their own domestic traffic is restricted and frequently made inoperative by reason of its intimate intermingling with interstate commerce and by the present freedom of the latter from any legislative restrictions. . . . National supervision would supplement, give direction to, and render effective state supervision, and is especially necessary as the only method of securing that uniformity of regulation and operation which the transportation system requires for its highest development.

The clearly established fact that, by reason of the constitutional division of powers between the states and the general government, the states have been able only to partially control the business of transportation within their own borders has been the principal inciting cause of the popular demand for national regulation, and is sufficient, in the judgment of the committee, to call for such action by Congress as will make effective the means of regulation found necessary and adopted by the states.

4. National legislation is also necessary, because the business of transportation is essentially of a nature which requires that uniform system and method of regulation which the national authority can alone prescribe.

The keynote to all the decisions of the United States Supreme Court concerning the power to regulate commerce is found in the declaration made in *Cooley v. Board of Wardens*, and frequently referred to in other cases, that "whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by Congress"; and, as is said by the court in the late case of *Gloucester Ferry Company v. Pennsylvania*, "it needs no argument to show that the commerce with foreign nations and between

74 GOVERNMENT AND RAILROAD TRANSPORTATION

the states, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation."

5. The failure of Congress to act is an excuse for the attempts made by the railroads to regulate the commerce of the country in their own way and in their own interests by whatever combinations and methods they are able to put into operation.

Through the absence of national legislation the railroads of the United States have been left to work out their own salvation. The practical results of their efforts have been by no means encouraging, as the present depressed condition of the railway interests bears witness, nor do they claim to have made any substantial progress during the past fifteen or twenty years. It is true that in this period the railroads have accomplished wonders in reducing the cost of transportation, in removing the limitations of distance from trade between remote localities, and in building up and widely extending the general commerce of the country. But, notwithstanding all these marvelous achievements, for which due credit should be given, the solid fact still claims consideration, that the inequalities and discriminations which characterize the operations of the system in its entirety are now as pronounced as in the earlier stages of its development.

In the recognized existence of these evils, and in the future of the national authority to offer any remedy, railroad managers have found their justification for seeking a remedy through methods which have not commended themselves to the public judgment and which have threatened even greater dangers to the body-politic. In the absence of national legislation, the railroads have naturally resorted to the only methods by which they could unaided secure any degree of stability and uniformity in their charges — consolidations and confederation. The final outcome of continual consolidations would be the creation of an organization more powerful than the government itself and perhaps beyond its control. The same result might follow the successful development of the policy of confederation or pooling, if unrestricted by governmental supervision, and either would be inimical to the public interest. But while this would be the logical outcome of the existing tendency of railway organization and management, there are satisfactory reasons for believing that it will not be the actual result, and that this policy has substantially reached the limit to which it can be carried. In a sense it may be true that the railroad properties

of the country are today largely within the control of a comparatively small circle, yet the colossal combinations which have been effected find other gigantic combinations equally as powerful successfully contending for the traffic of the territory they seek to control. The vast geographical extent of the country, its immense resources, the diverse interests of different sections, the abundance of capital, the commanding influence and the enterprise of the great commercial centers, the impossibility of controlling 35,000 miles of free water routes — all these considerations lessen the dangers to be apprehended from future consolidations and combinations, and at the same time show how difficult it will be for the railroads to work out the problem alone and unaided.

Experience and investigation have up to this time failed to indicate how the inequalities and discriminations complained of, which have grown into and become a fundamental part of the system upon which the business of the entire country is conducted, are to be done away with without a serious disturbance of every individual and public business interest. To equalize through and local rates, and to give them that degree of uniformity and stability so greatly needed, must necessarily involve a complete readjustment and reconstruction of the commercial relations and business methods of the whole country. How this is to be accomplished is the secret which underlies the satisfactory solution of the railroad problem.

That a problem of such magnitude, importance, and intricacy can be summarily solved by any master-stroke of legislative wisdom is beyond the bounds of reasonable belief. That the railroads, unaided or unrestrained, can or will eventually work out its solution seems highly improbable, judging from past experience, and cannot reasonably be expected. That a satisfactory solution of the problem can ever be secured without the aid of wise legislation the committee does not believe.

QUESTIONS

1. Judging from the causes of complaint listed above, what do you think the effect of competition in the railroad business would be?

2. It is stated that rates are based on the principle of "what the traffic will bear." Is it not true that prices in other businesses rest on that basis? Is there any reason why different rules should apply to railroads?

3. In what way did the railroads foster monopoly?

76 GOVERNMENT AND RAILROAD TRANSPORTATION

4. One of the many evils complained of was the common practice of the railroads in charging a smaller sum between point A and point B than between point A and point C, when C was situated between A and B. Why did the roads make such charges? What public disadvantage resulted?

5. "They [the railroads] have, like every other great agency, means of corruption that are not merely pecuniary." What are some of the means referred to? How may they be used?

6. How did the lack of uniform railroad laws enable roads to avoid paying damage charges on property?

7. How far had railroad combination extended by 1885?

8. What was popular sentiment concerning railroad regulation in 1885?

9. In case of a dispute in 1885 between carrier and shipper as to the reasonableness of a rate, who made the final decision?

10. In a lawsuit between a shipper and a railroad over an unjust discrimination, what difficulties did the shipper meet before the adoption of the Interstate Commerce Act?

11. Are the courts properly constituted to handle cases that involve rate-fixing?

12. In what ways did the transportation system of the United States show the need of a uniform system of regulation?

B. ORGANIZATION AND PROCEDURE OF THE INTERSTATE COMMERCE COMMISSION

1. COMPOSITION OF THE COMMISSION

[The pertinent statutory provisions are found in the interstate Commerce Act, Sections 11, 18, 24 (I. C. Act, pp. 32, 57, 77).]

QUESTIONS

1. What are the conditions governing the appointment of members of the Interstate Commerce Commission?

2. Is it desirable that their term of office be lengthened to ten years?

3. Why are members of the Commission prevented from investing their savings in railroad bonds?

4. Why has the number of members of the Commission been increased?

5. Is the divided responsibility, resulting from the present number of commissioners, disadvantageous?

6. How do members of the Interstate Commerce Commission compare in salaries and tenure of office with other responsible commissions of the Federal government? with Federal judges?

2. GENERAL JURISDICTION AND PROCEDURE

a. THE INSTITUTION AND PROCEDURE OF INVESTIGATIONS
BY THE COMMISSION

[A]

[The pertinent statutory provisions are to be found in the Interstate Commerce Act, Section 12; Section 13, paragraphs 1 and 2; Section 14; Section 16, paragraphs 5, 6, 7, 11; Section 16a; Section 17; Section 19; and Section 20, paragraph 10 (I. C. Act, pp. 32-35, 37, 53-57, 60).]

[B]

[The student should be familiar with the Rules of Practice before the Commission. The latest revision of the rules may be obtained at ten cents a copy from the Superintendent of Documents, United States Government Printing Office, Washington, D. C. The questions which follow are based partly on the statutory provisions referred to in [A], *supra*, and partly on the Rules of Practice.]

QUESTIONS

1. Who may bring cases before the Interstate Commerce Commission?
2. Differentiate the following parties to proceedings before the Commission: complainants, defendants, interveners, protestants, respondents, applicants, and petitioners.
3. What sorts of cases will be considered by the Commission?
4. Explain the purpose of the permission given by Section 17, paragraphs 2-4, of the act.
5. What advantage might there be to the Commission or to the public if the Commission were to hold sessions outside Washington, D. C.?
6. What are the duties of the examiners appointed by the Commission?
7. A shipper writes a brief letter to the Commission calling attention to an alleged violation of the Interstate Commerce Act. Can it be held that a complaint has been laid before the Commission?
8. "Formal complaints must conform to the requirements of Rule XXI." What restrictions does this place on formal complaints?
9. What essential features must be included in a formal complaint? How will differences in the subjects complained of alter the necessary facts that must be stated?

78 GOVERNMENT AND RAILROAD TRANSPORTATION

10. A shipper files a formal complaint alleging that he has been overcharged on a shipment of lead pipe. Draw up his complaint.

11. How does the treatment of informal complaints differ from that of formal ones? With what is each type likely to be concerned?

12. How will the defendant answer the complaint drawn up in Question 10?

13. How are complaints served on parties to the proceeding?

14. What are the advantages of agreement by stipulation to any of the facts involved in a case? Is such agreement often possible?

15. What type of documentary evidence may be offered by parties to a proceeding before the Commission?

16. What advantage does the shortened procedure have? How does it differ from the regular procedure?

17. A tariff schedule has been filed which discriminates against the chief manufacturing plant of a small city. What action should the chamber of commerce of the city take? What should the owners of the manufacturing plant do?

18. What advantages may an investigation by a body such as the Interstate Commerce Commission have over court proceedings covering the same subject?

b. REPORTS AND ORDERS RESULTING FROM THE COMMISSION'S INVESTIGATIONS

[A]

[The pertinent statutory provisions, in addition to those referred to in the previous section, are Section 21 and Section 12, paragraph 1, of the Interstate Commerce Act, and Section 6, paragraph 2, of the act of June 18, 1910 (I. C. Act, pp. 74, 32-33, 80-81).]

[B]

Bureau of Informal Cases¹

The number of informal complaints received was 7578, a decrease of 262. The carriers and the director general, as agent, filed 9393 special docket applications for authority to refund amounts collected under the published rates admitted by them to have been unreasonable, an increase of 1317. Orders authorizing refund were entered in 8450 cases, an increase of 800, and reparation thereon was awarded in the

¹Forty-first Annual Report of the Interstate Commerce Commission (1927), p. 13.

sum of \$1,685,975.30. In addition, 1298 cases were dismissed or disposed of without orders. The bureau also handled approximately 49,000 letters, many of which had the characteristics of informal complaints, although not so classified. Others sought general information and informal rulings upon the rights and obligations of the public and common carriers under existing statutes.

[C]

*Formal Docket*¹

The formal complaints filed numbered 1561, of which 1318 were original complaints and 243 subnumbers, an increase of 37 as compared with the previous period. We decided 1088 cases and 358 have been dismissed by stipulation or on complainants' request, making a total of 1446 cases disposed of as compared with 1327 during the previous period.

We conducted 1600 hearings and took approximately 291,299 pages of testimony as compared with 1584 hearings and 302,875 pages of testimony during the preceding period.

The following statement shows certain facts with respect to the condition of this docket as of October 31 of the years indicated :

	1924	1925	1926	1927
Formal complaints filed	1076	1210	1314	1318
Subnumbers	267	295	210	243
Investigation and suspension cases instituted	316	275	268	213
Cases under submission at end of period :				
Regular docket	466	359	462	633
Shortened procedure	30	56	136	291
Cases disposed of, including subnumbers	1464	1340	1499	1657

Shortened Procedure

In our report for 1923 we described the shortened procedure. Some modifications subsequently made in the rules are now incorporated in our rules of practice.

Briefly the shortened procedure, upon consent of all parties to cases involving simple issues, permits presentation of the evidence and argument by sworn memoranda and dispenses with oral hearing.

¹ Ibid. pp. 65-66.

80 GOVERNMENT AND RAILROAD TRANSPORTATION

During the year the use of the shortened procedure was suggested by one or more of the parties in approximately 50 per cent of the cases placed on the shortened-procedure docket. Approximately 35 per cent of the total number of formal complaints are now handled by that method.

The results, since the inception of this procedure, are shown below :

	NUMBER OF CASES
Suggested for handling under the shortened procedure, either by us or by the parties	2968
In which method not accepted by one or more of the parties	796
In which agreement was subsequently reached by the parties making further formal proceedings unnecessary —	
Before service of complainant's memorandum	142
After service of complainant's memorandum	108
Pending on suspense calendar	6
In which complaints withdrawn	190
Dismissed for want of prosecution	14
In various stages short of submission	427
Under submission at end of period	320
Decided	965

In cases handled under the shortened procedure and thus far decided, the average elapsed time to reach a decision has been 472 days from date of receipt of complaint and 266 days from date of receipt of the final memorandum.

[D¹]

The other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence, — a subject concerning which the courts below differed.

The pertinent provisions of the act to regulate commerce are these : Section 14 requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled" be paid within a fixed time ; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides : "Such suit shall proceed

¹ Extract from the opinion of Justice Van Devanter in *Meeker v. Lehigh Valley Railroad Co.*, 236 U.S. 412, 426.

in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." . . .

An objection which was directed against the orders as well as the reports is that they contain no findings of fact, or, at least, not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined. We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts, — a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute, and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding, and the later one affirmatively shows that it was made to supplement and give effect to the original.

QUESTIONS

1. What is the difference between informal cases and formal cases?
2. Why is the Commission not strictly up to date in its settlement of complaints?
3. What is meant by "findings of fact"?
4. Make clear by an illustration the difference between evidential facts and ultimate facts as pointed out by the Supreme Court.
5. Does the provision that every carrier is required to have an agent in Washington place an unjustifiable expense on the carrier?
6. Describe the various steps that will be taken by all parties concerned when a local chamber of commerce considers that the rate structure of the railroad serving its community is unjust and complains about it to the Interstate Commerce Commission.
7. What is the advantage derived from making the reports and decisions published by the Interstate Commerce Commission competent evidence in the courts of the states and of the United States?
8. By what power does Congress provide that the orders of the Interstate Commerce Commission shall be complied with by all carriers?
9. What reasons might make it advisable for the Commission to grant a rehearing on an order that it had issued?
10. Of what importance is a report to Congress from the Interstate Commerce Commission concerning recommendations for additional legislation?

3. POWER TO OBTAIN TESTIMONY

[A]

[The pertinent statutory provisions are found in Section 12 of the Interstate Commerce Act, in the Compulsory Testimony Act, in the Immunity of Witnesses Act, and in a part of Section 3 of the Elkins Act (I. C. Act, pp. 32-33, 92-94, 91).

In the act of February 4, 1887, there was the following addition to paragraph 1 of Section 12 of the Interstate Commerce Act: "And to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section." The second sentence of paragraph 2 was added to the act, and the part just quoted was omitted from paragraph 1 by the act of 1889. The words "by subpoena" were also added to the first paragraph in 1889. Paragraph 3 appeared in the original act. The first sentence of paragraph 1 and paragraphs 4, 5, 6, and 7 were added by the act of 1891.]

[B]

Interstate Commerce Commission *v.* Brimson

United States Supreme Court (1894), 154 U.S. 447

MR. JUSTICE HARLAN delivered the opinion of the court :

This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the Circuit Court of the United States on the 15th day of July, 1892, by the Interstate Commerce Commission under the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. . . .

The petition was based on the 12th section of the Act authorizing the Commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. Rep. 476, 480. . . .

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause :

Prior to the 14th of June, 1892, informal complaint was made to the Interstate Commerce Commission, under the provisions of the Interstate Commerce Act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois, in connection [with the various carriers entering Chicago]; that it had also caused to be incorporated under the laws of Wisconsin, the Milwaukee, Bay View & Chicago Railway Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic or traffic by a continuous shipment from places and cities without to cities and places

within Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago & Northwestern Railway Company; and that said Illinois Steel Company owned and controlled the above-named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the Act to Regulate Commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and by the connivance and consent of said other connecting railroad companies, in such a manner as to give the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the Commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies, so owned, controlled, and operated, had filed with the Commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges as required by the Act of Congress.

The Commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates, as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the Commission the above contracts, agreements, and tariffs.

An order was thereupon made by the Commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington, a full, complete, perfect, and specific verified answer, setting forth all the facts in regard to the matters complained of and responding to the following questions:

1. Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control (of) and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

2. Or (are) any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they and what are the divisions thereof between the several carriers?

3. Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company; and if so, to what amount?

The order further required all of the companies named to appear before the Commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the Commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet & Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the Interstate Commerce Act, or had resulted in obtaining for the Illinois Steel Company special illegal, unjust, or unreasonable rates in interstate traffic or in securing to that company illegal, undue, or unreasonable preferences.

The Commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads, which it was alleged to have caused to be incorporated, and whether such incorporations were for the

purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpoenaed to testify before the Commission was William G. Brimson, the president and manager of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching — switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them; mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the Commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the Commission, to produce it. He also refused to answer the question "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Stirling, the first vice president of the Illinois Steel Company, was also examined as a witness, and after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the Steel Company, refused to answer the question "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the Commission issued a subpoena *duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpoena was issued to William R. Stirling, as first vice president of the Steel

Company, commanding him to appear before the Commission and produce the stock books of that company. Keefe and Stirling appeared in answer to the subpoenas, but refused to produce the books or either of them so ordered to be produced.

The Commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Stirling to appear before that body and answer the several questions propounded by them and which they had respectively refused to answer, and requiring Keefe and Stirling to appear and produce before the Commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Stirling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the Interstate Commerce Act as empowered the Commission to require the attendance and testimony of witnesses and the production of books, papers and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the Commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the Constitution of the United States.

Is the 12th section of the act unconstitutional and void, so far as it authorizes or requires the circuit court of the United States to use their process in aid of inquiries before the Commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the Constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (Article 3, Section 2) and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by Congress (25 Stat. at L. 434, chap. 866) the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy" within the meaning of the Constitution. The circuit court, as we have seen, regarded the petition of the Interstate Commerce Commission as nothing more than an application by an administrative

88 GOVERNMENT AND RAILROAD TRANSPORTATION

body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said :

Undoubtedly, Congress may confer upon a non-judicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry, an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties within the meaning of the Constitution and not a mere application, like the present one, for the exercise of the judicial power in aid of a non-judicial body. *Re Interstate Commerce Commission*, . . . 53 Fed. Rep. 476, 480.

In other words, if the Interstate Commerce Act made the refusal of a witness duly summoned to appear and testify before the Commission in respect to a matter rightfully committed by Congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of Congress, in the name of the Commission, and under the direction of the attorney-general of the United States, against the witness so refusing to testify, to compel him to give evidence before the Commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by Congress to receive the judicial power of the United States.

This interpretation of the Constitution would restrict the employment of means to carry into effect powers granted to Congress within much narrower limits than, in our judgment, is warranted by that instrument.

The Constitution expressly confers upon Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and to make all the laws necessary and proper for carrying that power into execution. . . .

Congress thus having plenary power subject to the limitations imposed by the Constitution to prescribe the rule by which commerce

among the several states is to be governed, the question necessarily arises, what are the principles that should control the judiciary when determining whether a particular act of Congress, avowedly adopted to execution of that power, is consistent with the fundamental limitations of the Constitution?

The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, it was said :

The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

Again :

Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

Guided by these principles, we proceed to inquire whether the twelfth section of the Interstate Commerce Act, so far as it authorizes the present proceeding, assumes to invest the circuit courts of the United States with functions that are not judicial. . . .

We have before us an act of Congress authorizing the Interstate Commerce Commission to summon witnesses and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision — assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation — is, we repeat, not disputed and is beyond dispute. Upon everyone, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed in conformity with the Constitution. As every citizen is bound to obey

90 GOVERNMENT AND RAILROAD TRANSPORTATION

the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the Commission imposes upon anyone, summoned by that body to appear and to testify, the duty of appearing and testifying, and upon anyone required to produce such books, papers, tariffs, contracts, agreements, and documents, the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the Commission is legally entitled to investigate and if the witness is not excused on some personal ground from doing what the Commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the Commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to Congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of Congress and seek to obstruct its enforcement. And those issues made in the form prescribed by the act of Congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by indictment under an act of Congress declaring it to be an offense against the United States for anyone to refuse to testify before the Commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense or a proceeding by information to recover such penalties would have as its real and ultimate object to compel obedience to the rightful orders of the Commission, while it was exerting the powers given to it by Congress. And such is the sole object of the present direct proceeding. The United States asserts its right, under the Constitution and laws, to have these appellees answer the questions propounded to them by the Commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance and may be inquired of by any tribunal constituted by

Congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the Interstate Commerce Act, to do what is required of them by the Commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it. And the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form, and *direct in its operation*, for the prompt and conclusive determination of this dispute.

As the circuit court is competent under the law by which it was ordained and established to take jurisdiction of the parties, and as a case arises under the Constitution or laws of the United States when its decision depends upon either, why is not this proceeding judicial in form and instituted for the determination of distinct issues between the parties as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the Constitution? It must be so regarded, unless, as is contended, Congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the Commission, except through criminal prosecutions or by civil actions to recover penalties imposed for noncompliance with such orders. But no limitation of that kind upon the power of Congress to regulate commerce among the states is justified either by the letter or the spirit of the Constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to Congress, would defeat the principal objects for which the Constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the Interstate Commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the Constitution and the act of Congress is clear and strong.... In accomplishing the objects of a power granted to it, Congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the Constitution.

We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations

conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . .

It was said in argument that the twelfth section was in derogation of those fundamental guarantees of personal rights that are recognized by the Constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to Congress to regulate interstate commerce does not carry with it any power to destroy or impair those guarantees. This court has already spoken upon that general subject in *Counselman v. Hitchcock*, 142 U.S. 547. We need not add anything to what has been there said. Suffice it in the present case to say that as the Interstate Commerce Commission, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the Constitution from making answer to the questions propounded to him; or that he was not legally bound to produce the books, papers, etc., ordered to be produced; or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the Commission is entitled under the Constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the Commission could have been dismissed upon its merits.

It may be proper to state in this connection that after the decision in *Counselman v. Hitchcock*, the Interstate Commerce Act was amended by an act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of Congress, entitled 'An Act to Regulate Commerce' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or

on account of any transaction, matter or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no persons so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. at L. 443, chap. 83. But that act was not in force when this case was determined below. Nor does it reach the question whether a proceeding like the present one can be maintained in a circuit court of the United States. . . .

The duties assigned to the circuit courts of the United States by the twelfth section of the Interstate Commerce Act are judicial in their nature. The inquiry whether a witness before the Commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession and called for by that body, is one that cannot be committed to a subordinate administrative or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. . . .

Without the aid of judicial process of some kind, the regulations that Congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested — the validity of which is not questioned — of compelling a witness to testify before the Interstate Commerce Commission, to answer questions propounded to him relating to the matter under investigation and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy within the meaning of the Constitution, of which a court of the United States could take jurisdiction. Another mode would be

to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, Congress, in its wisdom, authorizes the Commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of Congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of Congress to prescribe.

We cannot assent to any view of the Constitution that concedes the power of Congress to accomplish a named result, indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result, directly, and by a different proceeding judicial in form. We could not do so without denying to Congress the broad discretion with which it is invested by the Constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish, namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the Interstate Commerce Act, that provided by the twelfth section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens. . . .

Another suggestion thrown out in argument against the validity of the twelfth section of the Interstate Commerce Act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding make a case or controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case, the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the Commission; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of

law, in the circuit court, is determined adversely to the defendants and they refuse to obey, not the order of the Commission, but the final order of the court. And, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands. . . .

We are of opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the Interstate Commerce Commission and by the answers of appellees, will be a legitimate exertion of judicial authority in a case or controversy to which, by the Constitution, the judicial power of the United States extends. And a final order by that court dismissing the petition of the Commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting and which may be enforced by judicial process. If there is any legal reason why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the circuit court, what judgment shall be here entered? The case was heard below upon the petition of the Commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the circuit court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of inquiries before the Commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section in the particular named is constitutional, and to remand the cause that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of

original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

QUESTIONS

1. Before the passage of the act of 1893 what reasons might a witness give for refusing to testify?

2. Is it ever legitimate to compel self-incriminating testimony?

3. An employee of a corporation is compelled to testify. His testimony incriminates his corporate employer. What effect has that on an action against the corporation?

4. How does the portion of Section 3 of the Elkins Act referred to above affect the Interstate Commerce Commission's powers to secure testimony?

5. A corporation is not subject to the Interstate Commerce Act. Can it be compelled to produce testimony under the legislation quoted?

6. A witness is compelled to testify concerning a definite violation of the Interstate Commerce Act. He introduces testimony concerning a crime that he has committed. Is he immune from prosecution for that crime?

7. In 1906 the Interstate Commerce Commission initiated an investigation to secure information in order to formulate a policy toward proposed legislation. It asked certain questions concerning business transactions of individuals. Could they be forced to testify?

8. In examining a witness the Interstate Commerce Commission asks a question an answer to which, the former thinks, might tend to disgrace him in the eyes of his employer. The witness contends that the Fifth Amendment authorizes him to refuse to answer. Decide.

9. In 1916 the Interstate Commerce Commission initiated an investigation to determine whether carriers were making use of revenue to influence political action. In the course of such investigation an officer of a carrier was asked whether certain expenses were charged to operating account or construction account. He declined to answer. Could the Interstate Commerce Commission compel an answer?

10. Define the extent of the Commission's power to compel testimony at the present time.

4. REPORTS AND ACCOUNTING

[A]

[The pertinent statutory provisions are found in Section 20 of the Interstate Commerce Act, paragraphs 1-8 (I. C. Act, pp. 62-66). Most of these provisions date from 1906, although part of paragraph 1 ap-

peared in the act of 1887. The Transportation Act of 1920 added the depreciation provisions of paragraph 5 and strengthened the power of the Commission to examine documents, papers, and correspondence.]

[B]

Interstate Commerce Commission *v.* Goodrich Transit
Company

United States Supreme Court (1912), 224 U.S. 194

MR. JUSTICE DAY delivered the opinion of the court :

The appellees in these four cases are corporations organized under state laws, and engaged in the carriage of passengers and freight by water upon the Great Lakes. They filed bills in the United States circuit court for the northern district of Illinois to enjoin the enforcement of certain orders of the Interstate Commerce Commission. The cases were afterwards transferred to the United States commerce court.

The orders of the Commission complained of comprise: First, an order prescribing the method of accounts and bookkeeping as to the operating expenses of the carriers, and a similar order as to bookkeeping concerning the operating revenues of the carriers; and, second, an order requiring a report of the carriers respecting their corporate organization, financial condition, etc. . . .

The pertinent averments necessary to a decision of the cases, as we view them, show that the carriers are corporations organized under the laws of certain states of the Union; that they carry passengers and freight upon the Great Lakes between ports in different states, which they designate as their port-to-port interstate business; that they carry passengers and freight wholly within a state; which they designate as their port-to-port intrastate business; and that they also carry passengers and property in interstate commerce under joint tariffs in connection with certain railroad carriers of the United States with whom they have agreed upon joint through rates, which they designate as their joint rail and water business. As to the Goodrich Transit Company, it is averred that 80 per cent of its gross revenue is derived from its port-to-port interstate and intrastate business, and less than 20 per cent of its gross earnings is derived from its joint rail and water business. A like averment is made with respect to the White

Star Line, except that it is said that in its business the revenue derived from joint rail and water traffic, as aforesaid, is less than 1 per cent of its entire revenue.

It is averred that the bookkeeping and accounting methods required by the orders of the Commission differ from those prescribed and now kept by the companies; that the orders of the Commission make no difference between the intrastate port-to-port business and the interstate port-to-port business and the joint rail and water business; and that the orders entered by the Commission prohibit the companies from keeping any accounts, records, or memoranda other than those prescribed by the Commission in such orders. . . .

As to the report called for by the order of the Commission, it is averred that such report was not required because of any complaint filed against the corporations for the violation of the act to regulate commerce; that there is no statute requiring the report to be kept secret, and, if it is made public, the affairs of the companies will be thrown open to inspection, to their injury; that a large number of the inquiries contained in the order of the Commission relate to details of the companies' business solely intrastate, or that which is from port to port; and that the report is not limited to the joint rail and water business of complainants.

There are also averments that the orders were unconstitutional, because the Commission, in undertaking to put in force such requirements, exceeded its authority in so far as the power was asserted to examine into the affairs of the companies not relating to their joint rail and water business, and having reference, as it was alleged, to their domestic business, or interstate business not within the terms of the act.

The commerce court enjoined the execution of the orders (190 Fed. 943), declaring that:

It (the Commission) acted within its authority when it made an order calling for reports of all business done by the petitioners under through bills of lading where the transportation was partly by railroad from one state to another, or from one place in the United States to Canada, an adjacent foreign country; and it was within its power when it prescribed the system of accounts and the uniform method of keeping accounts for such interstate business; and so far as the orders call for information confined to such traffic, or directly related thereto, and so far as the orders prescribe uniform systems of bookkeeping and accounting for such traffic and such as is directly related thereto, they must be sustained. But, in so far as the reports called for and the accounting rules prescribed extend beyond such interstate business of the

carriers, or include matters of intrastate traffic accounts and affairs and concerns exclusively, they become invasions of the rights of the carriers, and to the extent of such invasions are unlawful.

The court held that the orders concerning the report and auditing would be lawful respecting the interstate business done by the carriers in connection with railroads, as provided by the act, but, in requiring a report concerning the other business of the companies, and prescribing bookkeeping methods therefor, the Commission exceeded its authority, and the court granted the prayers of the petitioners for the orders of injunction, ordered a recast of the form of report in conformity with its opinion, and remanded the cases to the Commission for that purpose.

Whether this order of the commerce court was correct or not primarily depends upon the construction of the Interstate Commerce Act and the extent to which, in the respect involved in these cases, the carriers herein interested are within the terms of the law. The terms of the act of Congress, as amended June 29, 1906, and in force at the time when these orders were made, are plain and simple, and, we think, not difficult to comprehend. They are :

The provisions of this act (to regulate commerce) shall apply to . . . any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one state or territory of the United States or the District of Columbia to any other state or territory of the United States, etc.

The proviso, at the end of the section, that its terms shall not apply to the transportation of passengers or property wholly within one state was inserted for the purpose of showing the congressional purpose not to undertake to regulate a commerce wholly domestic. The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water, under an arrangement for a continuous carriage or shipment. It is conceded that the carriers filing the bills in these cases were common carriers engaged in the transportation of passengers and property partly by railroad and partly by water, under a joint arrangement for a continuous carriage or shipment. Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act. Carriers partly by railroad and partly by

water, under a common arrangement for a continuous carriage or shipment, are as specifically within the terms of the act as any other carrier named therein. It may be that certain provisions of the act are in their nature applicable to some carriers and not to others; but we are only concerned to inquire in this case whether the carriers thus broadly brought within the terms of the act by Section 1 thereof are subject to the provisions of the statute by the authority of which the Commission undertook to require the system of accounting and the report as to the organization and business of the corporations, and whether, if within the terms of the act, the orders are constitutionally made.

Certain it is that, when engaged in carrying on traffic under joint rates with railroads, filed with the Commission, the carriers are bound to deal upon like terms with all shippers who seek to avail themselves of such joint rates, and are subject to the general requirements of the act preventing and punishing the giving of rebates, the making of unjust discriminations, the showing of favoritism, and other practices denounced in the various sections of the act. They are undoubtedly subject to the provisions of Section 12 of the act, which permits the Commission to inquire into the management of the business of all common carriers subject to the act, and to keep itself informed as to the manner and method in which the same is conducted, with the right to obtain from such common carriers the full and complete information necessary to enable the Commission to carry out the objects for which it was created. The joint rates established are subject to revision by the Commission under Section 15 of the act. We must remember, also, in this connection, that, under Section 21 of the act, the Commission is required to make a report each year to the Congress, containing such information and data as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation as the Commission may see fit to make.

As to annual reports, the power conferred in Section 20 of the act extends to all common carriers subject to the provisions of the act. The Commission is vested with authority to prescribe the manner in which such reports shall be made, and to require specific answers to all questions as to which the Commission may need information. The report required in these cases was declared to be needed to enable the Commission to procure full information of the scope and character of the business of carriers by water within the jurisdiction of the Com-

mission, and of the extent of their operations, such as would enable the Commission to determine the form for annual report which would best give the information required by the Commission, and at the same time conform as nearly as may be to the accounting systems of carriers by water.

The form of report adopted by the Commission required a showing as to the corporate organization of each carrier by water subject to the act, the companies owned by it, and the parties or companies controlling it; as to the financial condition of the carrier, the cost of its real property and equipment, its capital stock and other stock and securities owned by it, together with all special funds and current assets and liabilities, as well as its funded indebtedness, with collateral security covering same; and as to finances with respect to the operations of the carrier for the current year, giving the revenue of the company and its source, whether from transportation, and what kind; or from outside operations, and all expenses, detailed, with a statement as to the net income or deficit from the various sources, and the report contains a profit and loss account and a general balance sheet. The report further requires certain statistical information, as follows: The routes of the carrier and their mileage; a general description of the equipment owned, leased, or chartered by the carrier; the amount of traffic, both passenger and freight, and mileage and revenue statistics, together with a separation of freight into the quantity of the various products transported, showing also whether originating on the carrier's line or received from a connecting line; and a general description of any separate business carried on by the carrier. But such report is no broader than the annual report of such carriers, as prescribed by the act. . . .

As to the accounts, the statute permits the Commission, in its discretion, for the purpose of enabling it the better to carry out the purposes of the act, to prescribe a period of time within which such common carriers shall have a uniform system of accounts and the manner in which such accounts shall be kept. The Commission may, the statute further provides, in its discretion, prescribe the forms of all accounts, records, and memoranda to be kept by the common carriers, to which accounts the Commission shall have access. And the act makes it unlawful for the carriers to keep any accounts, records, or memoranda other than those prescribed by the Commission.

We think this section contains ample authority for the Commission to require a system of accounting as provided in its orders, and a

report in the form shown to have been required by the order of the Commission. It is true that the accounts required to be kept are general in their nature, and embrace business other than such as is necessary to the discharge of the duties required in carrying passengers and freight in interstate commerce by joint arrangement between the railroad and the water carrier, but the Commission is charged under the law with the supervision of such rates as to their reasonableness, and with the general duty of making reports to Congress which might require a knowledge of the business of the carrier beyond that which is strictly of the character mentioned. If the Commission is to successfully perform its duties in respect to reasonable rates, undue discriminations, and favoritism, it must be informed as to the business of the carriers by a system of accounting which will not permit the possible concealment of forbidden practices in accounts which it is not permitted to see, and concerning which it can require no information. It is a mistake to suppose that the requiring of information concerning the business methods of such corporations, as shown in its accounts, is a regulation of business not within the jurisdiction of the Commission, as seems to be argued for the complainants. The object of requiring such accounts to be kept in a uniform way, and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction. Further, the requiring of information concerning a business is not regulation of that business. The necessity of keeping such accounts has been developed in the reports of the Commission, and has been the subject of great consideration. It caused the employment of those skilled in such matters, and has resulted in the adoption of a general form of accounting which will enable the Commission to examine into the affairs of the corporations, with a view to discharging its duties of regulation concerning them. . . .

The learned commerce court was of the opinion that the Commission might require accounts and reports, so far as the business of the water carriers with reference to joint rates by rail and water under a common arrangement was concerned, and remanded the cases to the Commission for revision of their orders upon that basis. But it is argued for the Commission, and it seems to us, with great force, that it would be impracticable to make such separation in any system of accounting. It is a matter of general knowledge, of which we may take judicial

notice, that traffic of all kinds is conducted upon the same ship and passage. A boat may leave a lake port carrying passengers and freight destined for ports within the state and for ports beyond the state, and as a part of the freight for carriage embrace some carried under the terms of joint arrangements made with connecting railroad carriers. How would it be practicable to separate the items of expense entailed in the carriage of these various classes? It is done upon one boat, with one set of officers and crew, and must, in the nature of things, be under one general bill of expense, — at least, it would seem impracticable to separate it into its items, so as to show the expense of that which it is contended is alone within the terms of the act, as construed by the carriers.

We think the act should be given a practical construction, and one which will enable the Commission to perform the duties required of it by Congress; and, conceding for this purpose that the regulating power of the Commission is limited, so far as rates are concerned, to joint rates of the character named in Section 1, it is still essential that, to enable the Commission to perform its required duties, even with respect to such rates, and to make reports to Congress of the business of carriers subject to the terms of the act, it should be informed as to the matters contained in the report. Congress, in Section 20, has authorized the Commission to inquire as to the business which the carrier does, and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within its power.

It is contended that this construction of the statute enables the Commission not only to regulate the interstate business, but as well the wholly intrastate business of the complaining corporations, and is, therefore, beyond the power of Congress. Such cases are cited and relied upon by complainants as the *Employers' Liability Cases* (Howard *v.* Illinois C. R. Co., 207 U. S. 463, and Illinois C. R. Co. *v.* McKendree, 203 U. S. 514). In those cases acts of Congress and orders of executive departments were held void because they undertook to regulate matters wholly intrastate, as distinguished from those matters of an interstate character and within the legislative power of Congress. And what we have already said as to the character of these orders is enough to indicate that in our opinion they are not regulations of intrastate commerce.

Furthermore, it is said that such construction of Section 20 makes it an unlawful delegation of legislative power to the Commission. We

cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. . . .

In Section 20, Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority.

And it is argued that Congress has no visitatorial power over state corporations. We need not reassert the ample power which the Constitution has been construed to confer upon Congress in the regulation of interstate commerce, declared in the many cases in this court from *Gibbons v. Ogden*, 9 Wheat. 1, to its most recent deliverances. In *Hale v. Henkel*, 201 U. S. 43, 75, while general visitatorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the general government had, in the vindication of its own laws, the same power it would possess if the corporation had been created by act of Congress.

As to one of the corporations, it is said that its business includes not only the carriage of passengers and freight, but that it owns and operates in connection therewith certain amusement parks. The report in controversy, as to business other than commerce, requires a general description of such outside operations, and also a statement of the income from and the expenses of the same. As we have said, if the Commission is to be informed of the business of the corporation, so far as its bookkeeping and reports are concerned, it must have full knowledge and full disclosures thereof, in order that it may ascertain whether forbidden practices and discriminations are concealed, even unintentionally, in certain accounts, and whether charges of expense are made against one part of a business which ought to be made against another.

Bookkeeping, it is said, is not interstate commerce. True, it is not. But bookkeeping may and ought to show how a business which, in part, at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority.

We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under Section 20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law. It therefore follows that the commerce court erred in granting the injunctions and in remanding the cases to the Commission with instructions to recast its orders.

Judgments reversed.

QUESTIONS

1. What reason had Congress for making the regulations contained in Section 20?
2. Provided publicity of accounts be secured, will there be any need of making the accounts uniform?
3. Under Section 20 is a carrier whose lines are located wholly within a state required to make any report of its business to the Commission?
4. The Interstate Commerce Commission directs carriers to keep separate accounts for freight and passenger traffic. Is such an order valid?
5. Has access to the correspondence of a railroad any direct relation to the understanding of the accounting practices of that road?
6. In 1914 the Interstate Commerce Commission, on the basis of authority given it by Section 20, requested a carrier to submit to it certain correspondence for examination. The carrier refused. The Commission applied to the district court for a writ of mandamus against the carrier. Decide.
7. A railroad relocates a portion of its lines. Under accounting regulations made by the Interstate Commerce Commission the road is not permitted to carry into its property account the full cost of the improvement, but is required to deduct from the cost the estimated replacement cost of the portions of track no longer used and is permitted to carry only the difference into its property account, a sum equal to the deduction being charged to the operating expenses of the year concerned. The carrier claims that such a regulation exceeds the power of the Interstate Commerce Commission. Decide.

8. Is the regulation referred to in Question 7 economically sound?
9. Suggest definite accounting regulations which Congress might enact that would make the supervision of railroads more efficient.

C. GENERAL DUTIES OF CARRIERS SUBJECT TO THE INTERSTATE COMMERCE ACT

[The pertinent statutory provisions are found in Section 1, paragraphs 4 and 6, of the Interstate Commerce Act as amended (I. C. Act, pp. 3-4). Paragraph 4 is printed below to indicate the changes made at different times. The first part of this paragraph was introduced into the act by the Hepburn Act of 1906; words underlined once were added by the amendment of June 18, 1910; those underlined twice were added and those in parentheses excised by the Transportation Act of 1920. Paragraph 6 was introduced into the act by the amendment of June 18, 1910; but the last sentence read "and every such unjust and unreasonable classification, regulation, and practice with reference to commerce between the states and with foreign countries is prohibited and declared to be unlawful," until it was changed to its present form by the Transportation Act of 1920.]

SECTION 1. (4) It shall be the duty of every common carrier subject to (the provisions of) this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares and charges applicable thereto, and to provide reasonable facilities for operating (such) through routes and to make reasonable rules and regulations with respect to (exchange, interchange and return of cars used therein, and for) the operation of (such) through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

QUESTIONS

1. What is the difference between the requirements of the two paragraphs? Why is paragraph 6 necessary in addition to paragraph 4?
2. What is the significance of the changes made in 1920?

D. THE COMMISSION AND THE COURTS

[A]

[The powers of the Interstate Commerce Commission to appeal to the courts for various purposes are considered in other sections. The case here quoted illustrates the power of the courts to review and enjoin orders of the Commission. Many of the cases that are quoted later will illustrate this power as an incident to an interpretation of certain of the provisions of the Interstate Commerce Act. No single sections of the act can be referred to as indicating the statutory provisions upon which the decision here quoted is based. The District Court Jurisdiction Act (I. C. Act, pp. 94-99) and the Expediting Act (I. C. Act, pp. 99-100) contain certain procedural provisions with which the student should be familiar.]

[B]

Interstate Commerce Commission *v.* Union Pacific
Railroad Company

United States Supreme Court (1912), 222 U. S. 541

These . . . appeals are brought by the Interstate Commerce Commission from a decree enjoining a reduction of lumber rates named in tariffs filed by the Great Northern, the Northern Pacific and the Union Pacific Railroads. . . .

[The Commission had rendered a decision suspending certain new and increased rates filed by the carriers. The old rates were declared just and reasonable, but certain readjustments were permitted. The carriers filed bills to enjoin the Commission's order. In the Commission's answer it was contended that "courts ought not and could not review its judgment, and finding, unless it be made clearly to appear that the orders complained of transcend the pale of legitimate regulation."

The cases were referred to a master, who reported that since the Commission's order was beyond its powers, it was unlawful, and recommended that certain portions of the order be enjoined. The circuit court overruled the exceptions filed by the Commission and by the carriers to the report of the master.]

MR. JUSTICE LAMAR . . . delivered the opinion of the court.

These appeals raise the single question as to whether in making the 45-cent rate, the Commission acted within or beyond its power. As the statute makes its finding *prima facie* correct (Cincinnati &c. Ry. *v.* Interstate Commerce Commission, 206 U. S. 142, 154), it will be more convenient to consider the case from the standpoint of the carriers, who first insist that the order was void because made without evidence, or finding, that the 50-cent rate was unreasonable.

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Interstate Commerce Commission v. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific v. Interstate Commerce Commission*, 219 U. S. 433; *Interstate Commerce Commission v. Northern Pacific*, 216 U. S. 538, 544; *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U. S. 144, 174.

In determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." *Illinois Central v. Interstate Commerce Commission*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof — but the courts will not examine the facts

further than to determine whether there was substantial evidence to sustain the order.

2. We proceed, then, to a consideration of the carriers' contention that the order was void because made without any testimony that the 50-cent rate of 1907, to St. Paul, was unreasonable. We find that, as far back as 1893, the rate on fir lumber was reduced to 40 cents, on the theory that after a carrier had been paid for transporting a carload of freight from the east to the west, it was better to haul it back loaded with lumber at 40 cents, thereby earning something, than to take it back empty and get nothing. But if, after the empty-car movement had been reversed, the carrier had to be at the expense of hauling cars empty to the west for the purpose of returning them loaded with lumber at the unremunerative rate of 40 cents, there would be a double loss, — it got nothing for hauling the empty car from St. Paul to the coast, and it derived no profit for hauling it back at the low rate. They contend that this situation, in connection with the enormous increase in the cost of operation, not only justified but required an advance over the 40-cent rate. And this view of the testimony seems to have been taken by the two commissioners who dissented. If there was no other evidence, the Commission's order could not be sustained.

But these facts do not stand alone. In the first place there was no appeal from the Master's finding that :

The carriers concede that they are unable to determine the cost of this traffic, in and of itself ; and that they are unable to say, with any satisfactory accuracy, whether or not they make a profit upon it ; but they have all conceded that, in their judgment, speaking as experts, the lumber traffic has not been confiscatory and has not been performed for less than cost.

This concession, of course, does not cover the question at issue, but it does fix a starting point. It establishes an important fact in dealing with the difficult question of determining what is a reasonable rate on a particular article. Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an

unreasonably high rate on such article. But the absence of direct testimony that the 50-cent rate was unreasonably high is unimportant. Neither can any specific effect be given to the statement of witnesses that the 40-cent rate was low. The reasonableness of rates cannot be proved by categorical answers, like those given, where a witness may in terms testify that the goods were worth so much per pound, or the services worth so much a day. Too many elements are involved in fixing a rate on a particular article, over a particular road, to warrant reliance on such method of proof. The matter has to be determined by a consideration of many facts.

In this case the Commission had before it many witnesses and volumes of reports, statistics and estimates, including the rates on lumber charged by other roads, and those charged by these carriers on other classes of freight. There was evidence that during the fourteen years, when the 40-cent rate was in force, the carriers had, by proper management and without wasteful economies, kept their properties in a high state of efficiency, and after paying all the costs of operation, maintenance, depreciation, fixed charges and sinking funds, had been able to pay reasonable dividends.

There was evidence as to the value of the road, the amounts expended in betterments and paid out in dividends, ratio between the increased earnings and increased expenses, with many tables and estimates tending to show the cost of hauling empty cars, fully loaded cars, and those carrying an average load.

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. There was then, under the statute, nothing for the companies to do except to comply with the order — or, act on the suggestion thrown out in the Commission's answer, and apply for a rehearing, in reliance upon its power and duty to modify its order if the new evidence warranted such change.

3. When the bills were filed the carriers insisted that the order was the result of a mistake of law, in that the Commission held that the long maintenance of the 40-cent rate raised a presumption that it was

reasonable, because the carriers had been earning a reasonable profit. But we need not consider whether, under such circumstances, the maintenance of the admittedly low rate raised any presumption of reasonableness; or, if so, whether it is not neutralized by the presumption of right conduct by the carrier as primary rate-maker (*Interstate Commerce Commission v. Chicago, etc.*, 209 U. S. 108, 119). For whatever influenced the Commission in restoring the rates to the Pembina line — as to which there is now no appeal — it is evident that as to points east of that line they did not act on any presumption that the old 40-cent rate was reasonable. On the contrary, they acted directly contrary to any such presumption, and instead of maintaining the old rate, allowed a new and higher rate to St. Paul, permitting an advance of five cents per hundred, or $12\frac{1}{2}$ per cent, or between \$500,000 and \$1,000,000 per annum, to the Great Northern road alone.

4. And this brings us to a consideration of the Master's finding, approved by the circuit court, that in fixing a rate of 45 cents to St. Paul, the order on its face was void because, with traffic conditions over the three roads practically the same, the Commission allowed the high rate of 50 cents to the short route and the low rate of 45 cents to the long route. It was argued that when the Commission had adjudged that a rate of 50 cents for 1800 miles was reasonable, it was manifestly unreasonable to allow a rate of 45 cents for 2052 miles, and that such order was so palpably unjust and unreasonable as to be beyond the substance, if not beyond the form, of the Commission's power.

It does not follow, as a matter of law, that rates should be the same for the same distance over two different roads, and this would be especially true if the cost of transportation was greater over the Union Pacific than over the northern lines because it crossed the mountains 2000 feet higher than they.

But, with the Master's finding that traffic conditions were practically the same, it might be that the order would appear unreasonable on its face, if it fixed the high rate over the short route and the low rate with less revenue, per ton, per mile, over the long route. But the order cannot be considered by itself alone. It must be read in the light of the entire record, including the important fact that the carriers themselves, in making their rates, made a similar difference between the long and the short line.

By their own tariffs they clearly show that they did not consider mere distance a controlling factor in fixing the rates now under attack. And this is not exceptional, for it appears that they make rates from

basing points to common points, with the result that two cars of lumber, of the same weight, may be shipped from the same place, over the same line, at the same rate to different points, although the distance one car is hauled may be several hundred miles greater than the other.

But the fact that the carriers themselves, in 1893, 1901 and 1907, charged more to Omaha than to St. Paul is a much weightier fact in considering this attack on the order. In making the difference between these two cities the Commission only did what the carriers themselves had done under their old and new rates. After 1901, the rate to Omaha was 50 cents and the rate to St. Paul, over the longer route, was 40 cents. In the 1907 tariff, now under consideration, the rate to Omaha, over the short route, was fixed by them at 55 cents; and that to St. Paul, for the longer route, was fixed at 50 cents. This was a difference of 5 cents in favor of the short route. The Commission made the same difference in favor of the same road.

This difference is supported by what the record shows as to rates to points on the Pembina line. Inasmuch as no appeal was taken from the refusal to enjoin their restoration, we may assume that all parties admit these rates to be reasonable. But there was a difference as to rates to points on this line which shows that the per-mile ratio cannot be regarded as a necessary standard. For example, the rate to Omaha, on the lower part of this line, was 50 cents, while the rates to points on the northern end was 40 cents. This was a difference of 20 per cent in favor of Omaha, although there was no such difference in the distance. Again, timber shipped from the coast to St. Paul, passed through this 40-cent point on the northern end of the Pembina line. The distance from the coast to St. Paul was one eighth greater, and the advance allowed was one eighth, or five cents over the 40-cent rate.

It is quite true that the carriers may do what they could not be compelled to do. But it is not to be assumed that they made and continued these different rates between these two cities arbitrarily and without reason. It was proper for the Commission to consider the weight and the character of these reasons and the causes which prompted and justified the carriers in charging these different rates. When the Commission maintained the same ratio of difference as that made by the carriers themselves, it cannot be fairly said that such an order was so arbitrary as to be palpably and gravely unjust, and beyond the substance, if not the form, of its power.

5. A final point remains to be considered, although it involves an issue not presented by the pleadings, not included in the Master's

report and not passed on by the circuit court. It is, however, argued that on this appeal the record may be searched and the decree affirmed because, in making its order, the Commission was influenced solely by a consideration of the effect of the advance in rates on the lumber industry.

It does appear that the lumbermen, in their complaints before the Commission, alleged that the advanced rates were unreasonable; and, apparently on the theory that the injurious effect on their business would sustain that contention, they alleged that the new rate would destroy the lumber industry. Issue seems to have been joined on both propositions, and there were mutual criminations and recriminations of prosperity — the lumbermen insisting that the railroads had made large profits under the old rate, and did not need the advance, which would destroy the ability of the lumbermen to ship lumber to the east.

The carriers, on the other hand, contended that the 40-cent rate had opened up new markets and developed the lumber business to a point where it had become enormously profitable, and would continue so under the advanced rates, because white pine had practically disappeared from the market, and that the increased price of lumber more than made up for the increased cost of timber and labor.

It is true, also, that the Commission examined into the effect of the old and the new rate on carrier and lumbermen alike. But we do not find that it made the order because of the effect on the lumber industry. In the *Willamette Case* (219 U.S. 445), counsel for the millmen admitted that the rate there under attack was reasonable in and of itself, but insisted that statements of officers and action of the carrier operated to estop the road from raising a low rate up to a reasonable rate.

Nothing of the sort is found here. The rates were attacked as unreasonable, and, on evidence already referred to, the Commission found that the old rates to the Pembina line were reasonable and could not be changed, but that there might be a reasonable increase to points east of that line, not to exceed five cents.

While there is language in the opinion which, looked at alone, might suggest that the Commission was attempting to decide more than the single question as to what was a reasonable rate, yet, taking the opinion as a whole, it affirmatively appears that the Commission confined itself to the exercise of its statutory powers to fix rates. In its opinion

114 GOVERNMENT AND RAILROAD TRANSPORTATION

it did discuss the issue of prosperity presented by millmen and carriers alike, but held (p. 14) that

. . . This controversy cannot be determined wholly upon the ground that complainants have enjoyed the lower rate for many years and that interests have been built up thereunder, and that loss of business investments, profits and markets will result under the increased rates. It must be determined on the justness or reasonableness of the rates in controversy. . . . If the old rates were too low to be just and reasonable, complainants (millmen) cannot urge their loss as a ground for maintaining them; if the old rates were just and reasonable, the defendants cannot justify the advance on the ground of the prosperity of the lumber business.

Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumptions arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power and, in view of the statute, its lawful orders cannot be enjoined. The decree, therefore, must be

Reversed.

QUESTIONS

1. What is meant by "the findings of the Commission are made by law *prima facie* true"?

2. On what grounds in the case just quoted did the Supreme Court base its reversal of the circuit court's decree?

3. The Commission orders that in time of shortage each mine be given its pro-rata share in the distribution of fuel cars, no attention being paid to assigned cars or to railroad fuel cars. What basis have the carriers for appealing this order?

4. A case is appealed to the courts on the ground that an order of the Commission is clearly unwise from the point of view of the general public. This contention seems justified from the evidence. Will the courts reverse the Commission's order?

5. In a rate case it is contended that the Commission's decision gave too much weight to certain portions of evidence presented to it and too little weight to other portions. Does this form a good basis for an appeal from the Commission's decision to the courts?

6. The Commission in a rate hearing admits evidence that would be incompetent in a judicial proceeding. Does this constitute grounds for enjoining the enforcement of the Commission's order?

7. In a rate-adjustment case the Commission fails to give all parties concerned the customary notice of hearings to permit them to prepare evidence. Is this a proper ground for an appeal?

8. On the ground that the Commission had unlawfully permitted a carrier to increase rates in violation of the last paragraph of Section 4 of the Interstate Commerce Act a shipper appeals to the courts. Will relief be denied on the ground that the plaintiff has not sought redress before the Commission?

9. The Commission gives a railroad permission to acquire a terminal road which controls a considerable part of the traffic of a large city. Other roads entering the city complain that such acquisition will not permit them to compete with the first road on equal terms. Under what conditions will the courts uphold the Commission's order?

10. Does an appeal to the courts involve a complete reopening of the entire case?

11. On what grounds may a decision of the Interstate Commerce Commission be reviewed in the courts?

E. PENALTIES AND REMEDIES (GENERAL¹)

1. CIVIL LIABILITY OF CARRIERS

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Sections 8 and 9, paragraphs 11 and 12 of Section 20, and the clause of Section 22 which immediately precedes the first proviso in paragraph 1, together with that proviso (I. C. Act, pp. 28-29, 67-69, 74). Sections 8 and 9 and the portion of Section 22 here referred to have not been changed since 1887. The Carmack amendment of 1906 first imposed upon initial carriers the liability for loss on through shipments, with a remedy over against the carrier on whose lines the loss occurred. This provision was rewritten and considerably enlarged by the Cummins amendment of 1915. The Transportation Act of 1920 was responsible for the insertion of the first proviso of paragraph 11 and for a modification of the fourth proviso. By an act of March 4, 1927, the following changes have been made in the text as it appears in I. C. Act, pp. 67-69: (1) After the word "Territory" in line 25 (p. 67), insert "or any common carrier, railroad, or transportation company

¹ Special penalties attached to violations of particular provisions are dealt with under the appropriate heads.

delivering said property so received and transported." (2) In the first proviso, after the word "initial" insert "or delivering." (3) Between the third and fourth provisos insert "*Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a state court, only in a state, through or into which the defendant carrier operates a line of railroad." (4) In the fourth proviso, before "common carrier" insert "receiving or delivering." (5) Substitute for the fifth proviso the following two provisos: "*Provided, however*, That if the loss, damage, or injury complained of was due to carelessness or negligence while the property was in transit, or while the property was being loaded or unloaded, or was due to unreasonable delay in transit or in loading or unloading, then no notice of claim or filing of claim shall be required as a condition precedent to recovery, but in no case under this proviso shall suit be instituted after three years from the time such cause of action accrued; *And provided further*, That for the purposes of this paragraph and of paragraph 12 the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination." (6) In paragraph 12, after "bill of lading" insert "or delivering such property so received and transported."]

QUESTIONS

1. What is the justification for holding the initial carrier liable for losses occurring to a through shipment on the lines of connecting carriers?
2. Do the same reasons apply to the imposition of this liability on the final, or delivering, carrier?
3. Why should an exception be made when the loss occurs while the property is in the custody of a carrier by water?
4. Why should an exception be made in the case of baggage?
5. Just what is the status of ordinary live stock under paragraph 11 of Section 20, and why should it not be subject to the same treatment as other property?
6. What is the significance of the changes made by the act of March 4, 1927?

[B]

Texas and Pacific Railway Company *v.* Abilene Cotton Oil
Company

United States Supreme Court (1907), 204 U.S. 426

[The Abilene Cotton Oil Company paid to the Texas and Pacific Railway Company, under protest, charges for an interstate shipment of cotton seed which were based on a rate filed with the Interstate Commerce Commission and promulgated as required by the Interstate Commerce Act. The shipper then brought suit in a Texas court to recover \$1951.83 damages, claiming that the rate was unjust and unreasonable, and was given judgment. The railway company took the case by writ of error to the United States Supreme Court.]

MR. JUSTICE WHITE delivered the opinion of the court :

... The fundamental question, ... is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note *a*; 2 Smith, Lead. Cas., Part 1, 8th ed. (Hare & W. notes), p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the preëxisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory. . . .

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was, in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. *Parsons v. Chicago & N. W. R. Co.*, 167 U.S. 447, 455; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, 275. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479, 494. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 184, 167 U.S. 479.

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates

be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a

particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that Section 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the ninth section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained

of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts, and in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same. [The discussion of these cases is omitted.]

When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and in the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect, correcting established schedules. . . .

In view of the binding effect of the established rates upon both the carrier and the shipper, . . . the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award repara-

tion in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands.

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in Section 22 of the act to regulate commerce, *viz.*: "... Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission, great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it. Even, however, if, in any case, we were at liberty to depart from the obvious and necessary intent of a statute

upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that, by judicial exposition and in practical execution, it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act.

[The court refers to Sections 1 and 3 of the Elkins Act.]

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

QUESTIONS

1. Does the reasoning of the court apply to actions brought by shippers in Federal courts as well as to those brought in state courts?

2. When should a shipper appeal directly to the courts to recover damages from a carrier who has violated the act, and when should he go first to the Interstate Commerce Commission?

3. Why should the reservation of existing remedies at common law or by statute be included? Does the decision in the principal case materially reduce the importance of the reservation?

124 GOVERNMENT AND RAILROAD TRANSPORTATION

4. Have the courts any general equitable jurisdiction over interstate carriers?

5. The agent of the railway at the point of shipment of an interstate shipment quoted the shipper a rate less than the lawful schedule rate. When the goods arrived at their destination the road exacted the schedule rate. The shipper paid under protest and sued in a state court to recover the amount paid in excess of the rate quoted. Decide.

6. P has paid the D railroad the lawful rate for coal shipped by him from Scranton to New York. Later he discovers that the railroad has given to P's competitor a rebate from such rate on similar shipments. P sues D to recover the amount of the rebate. Decide.

7. The D railroad has made a rule, which was admitted to be reasonable, providing for the distribution of its coal cars among various coal districts. The P coal company sues for damages in a Federal court on the ground that D failed to give the P company the number of cars to which it was entitled under the rule. Has the court jurisdiction? Would a state court have jurisdiction?

8. P, a citizen of Ohio, sues the D railroad company, an Ohio corporation, under Section 9. The railroad pleads that the court lacks jurisdiction, since both parties are citizens of the same state. Is it a good plea?

[C]

*Released Rates*¹

... It is our practice to dispose of twentieth-section applications without formal hearings unless a hearing is requested or appears in our judgment to be necessary. Since the amendment of the statute became effective in 1916 only one such hearing has been held. This related to two applications filed by the southeastern rail carriers for authority to establish released rates on marble, granite, and other stone in various states of finish. In denying the applications, *Released Rates on Stone in the Southeast*, 93 I. C. C. 90, we said :

The fact that claims for loss and damage are frequent in the transportation of a given commodity is not in itself a valid reason for the establishment of released rates. If the commodity is fairly uniform in value, so that the carrier knows with a reasonable degree of certainty the liability it assumes when it accepts a shipment for transportation, it may and should establish reasonable tariff regulations relative to packing and loading, with a view to minimizing such claims, and, having done so, should then publish a single rate based

¹ Thirty-eighth Annual Report of the Interstate Commerce Commission (1924), pp. 39-40.

on the known transportation characteristics of the commodity. Nor is the fact that an article has a wide range of value alone sufficient to warrant the establishment of released rates, because claims for loss and damage on that article may be negligible in any event. But where those conditions concur, where the susceptibility to loss or damage is comparatively high and the wide range in the value of the commodity makes the amount in any claim that may arise difficult to estimate, the carrier is at a disadvantage unless it is permitted to base its liability and its charges on a declaration of value obtained in advance from the shipper. In such a case a basic rate should be established conditioned upon the declaration by the shipper of a fair average value of the commoner forms of the commodity, together with one or more higher rates to apply when a greater value is declared, such higher rates to be no more than reasonably commensurate with the additional risk assumed by the carrier.

The value of the commodity transported is an element in rate-making aside from the risk of loss or damage, because it serves to measure the value of the service rendered the shipper. But where rates based on declared or agreed value have been authorized by us, the statute accords shippers the right to understate the value for the purpose of securing the lower rate, and it is clear that if the excess of the unreleased over the released rates is more than the cost of insurance, shippers will ordinarily release the carrier and obtain transit insurance elsewhere. But frequently transit insurance cannot be obtained. When it is not available, those shippers who are financially able to do so will assume the risk of loss themselves. The small shipper is less apt to be able to risk the loss of his less frequent shipments, and will thus in greater measure feel compelled to resort to the higher unreleased rates for adequate protection. The alternative rates which would result from the carriers' proposals will thus not work with equal justice to all. . . .

QUESTIONS

1. When rates for carrying a given commodity vary with the declared value of the shipment, is the railway not in effect engaged in the insurance business?

2. Is it sound policy to permit carriers to undertake this special liability for extra remuneration, rather than to force the shipper to resort to insurance companies for protection? If so, why should the practice not be extended to all commodities?

2. PENALTIES FOR VIOLATIONS OF THE ACT (GENERAL)

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 10, paragraph 1 (to the proviso), and Section 16, paragraphs 8-10, and in the first sentence of paragraph 1 and the first sentence of paragraph 2 of Section 1 of the Elkins Act (I. C. Act, pp. 29-30, 53, 87-88, 89). The portion of Section 10 referred to

126 GOVERNMENT AND RAILROAD TRANSPORTATION

was enacted in 1887, but the words "for which no penalty is otherwise provided" were added in 1910. The portion of Section 16 referred to was introduced into the act by the Hepburn Act of 1906, but paragraph 8 was applicable only to orders made under Section 15 of the act until it was extended to Sections 3 and 13 by the Transportation Act of 1920. In the second paragraph of Section 1 of the Elkins Act the words "or shipper" were inserted in 1906.

The Interstate Commerce Commission has recommended that Section 10 be amended by providing therein a minimum fine of not less than \$500 for each offense (see IV, I, 5, [B]).]

QUESTIONS

1. Explain the importance of adding the provisions of the Elkins Act referred to above to those already enacted in the first portion of paragraph 1 of Section 10 of the Interstate Commerce Act.

2. Why was it necessary to add the provisions of paragraphs 8-10 of Section 16 to the provisions of Section 10 and the Elkins Act?

3. It is argued that the provisions quoted from the Elkins Act are unconstitutional, since, by holding a corporation criminally liable for the acts of its agents, Congress is in reality punishing the innocent stockholders and so depriving them of their property without due process of law. Is this sound?

3. MANDAMUS TO COMPEL COMPLIANCE WITH THE ACT

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 20, paragraph 9 (introduced by the Hepburn Act of 1906), and Section 23, added to the act in 1889 (I. C. Act, pp. 66, 76-77).]

QUESTIONS

1. What is the essential difference between the two provisions referred to above?

2. What are the advantages and disadvantages of the remedy by mandamus as compared with the other remedies provided by the act?

4. ENFORCEMENT OF ORDERS OF THE INTERSTATE COMMERCE COMMISSION

a. ORDERS FOR THE PAYMENT OF MONEY

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 16, paragraphs 1, 2, and 4 (I. C. Act, pp. 51-53).

Section 16 was completely rewritten by the Hepburn Act of 1906, from which the present text of paragraphs 1, 2, and 4 dates, excepting that in the first sentence of paragraph 2 the words "or in any state court of general jurisdiction having jurisdiction of the parties" and, in the second sentence, the words "in the circuit court of the United States" were introduced in 1910.]

QUESTIONS

1. Why should the Commission not be given power to enforce its own orders for the payment of money?
2. Is not the provision that the "findings and order of the Commission shall be *prima facie* evidence of the facts therein stated" a denial of due process?
3. Does the petition of a complainant who seeks enforcement of an order of the Commission differ essentially from an application for a writ of execution upon the judgment of a court?
4. What facts should be contained in the findings and order of the Commission for this purpose?
5. May the court admit evidence that was not before the Commission at the hearing?
6. May the court enforce part of the order of the Commission and reject the rest?
7. Why should a successful petitioner be allowed an attorney's fee? Does it cover service before the Commission as well as services in court?
8. A carrier resists an order of the Commission to pay reparation for excess charges, on the ground that the shipper has suffered no loss, since he has already passed on all the charges to his customers. Decide.

b. ORDERS OTHER THAN FOR THE PAYMENT OF MONEY

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 16, paragraph 12 (I. C. Act, p. 54). The text is that of the Hepburn Act of 1906 as amended in 1910.]

QUESTIONS

1. Is this provision obsolete since the abolition of the commerce court in 1913?
2. Can a carrier against whom an order of the Commission is directed appeal to the courts for an injunction restraining the Commission in its enforcement of the order?

5. STATUTE OF LIMITATIONS

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 16, paragraph 3 (I. C. Act, pp. 51-52). There was in the Interstate Commerce Act no limitation of time within which actions based on the act might be brought until the Hepburn Act of 1906 prescribed that complaints for the recovery of damages must be filed with the Commission within two years from the time the cause of action accrued, and petitions for enforcing orders for the payment of money within one year from the date of the order. The Transportation Act of 1920 added a general limitation of three years upon actions brought by carriers for the recovery of charges. The present text is the result of an act of June 7, 1924.]

QUESTIONS

1. Why should a longer period be allowed to bring actions to recover charges or overcharges than is allowed for complaints for the recovery of damages not based on overcharges?

2. The Revised Statutes of the United States give a five-year period for bringing actions for any penalty or forfeiture accruing under the laws of the United States. Why should shippers seeking to recover overcharges from interstate railways be limited to a much shorter period?

3. If a shipper chooses to bring his action in a court instead of complaining to the Commission, does the two-year limitation apply?

4. Why should so short a period be allowed to file a petition for the enforcement of an order for the payment of money?

6. COMMISSION'S RECORDS, REPORTS, AND DECISIONS AS EVIDENCE

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 14, paragraph 3, and Section 16, paragraph 13 (I. C. Act, pp. 37 and 54). The text is substantially that of the Hepburn Act of 1906, though classifications were not included in Section 16, paragraph 13, until the act of 1910. Compare also the provisions in Section 16, paragraph 2, of the act, already referred to in IV, *E*, 4, *a*, *supra*.]

7. PARTIES TO PROCEEDINGS UNDER INTERSTATE COMMERCE ACTS

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 13, paragraph 1 (first sentence); Section 13, paragraph 2 (first sentence), and Section 16, paragraph 4, and in the Elkins Act, Section 2 (I. C. Act, pp. 34-35, 52-53, 90). The provisions of Section 13 referred to were in the act of 1887, but the words "company," "or other organization," and "or any common carrier" were added in 1910.

The text of Section 16, paragraph 4, is that of the Hepburn Act of 1906.]

8. EXPEDITING ACT

[The pertinent statutory provisions are found in the proviso at the end of Section 3 of the Elkins Act (I. C. Act, pp. 91-92).]

9. EMBEZZLEMENT OF FUNDS OF COMMON CARRIER

[The pertinent statutory provisions are found in Section 9 of the Clayton Act of 1914 (I. C. Act, pp. 144-145).]

F. RAILROAD FINANCE

1. VALUATION

a. GENERAL VALUE UNDER THE VALUATION ACT

[A]

[The pertinent statutory provisions are found in Section 19a of the Interstate Commerce Act (I. C. Act, pp. 58-62). This is the La Follette Valuation Act of 1913 with minor amendments.]

[B]

*Statement of Methods of Valuation*¹

STATEMENT OF METHODS

In making valuations of steam railroads the entire country was divided into five districts, each containing approximately 50,000 miles

¹ Parts of Appendix 3 of the tentative valuation of the Texas Midland Railroad (1918), 75 I. C. C. 108.

130 GOVERNMENT AND RAILROAD TRANSPORTATION

of railway. This division was generally a territorial one by state lines, but an entire railway system has been usually assigned to one district, even though it extended into the territory of another district. Thus, the Northern Pacific Railway was assigned to the Pacific district, although it ran through the states of three districts.

The work itself was divided, according to its character, into three sections or classes — engineering, land, and accounting. These titles sufficiently indicate the general nature of the work of the several sections. . . .

THE ENGINEERING SECTION

The valuation act requires the Commission to show, among other things, the cost of reproduction new and the cost of reproduction less depreciation of the property owned or used for common-carrier purposes. The work of the engineering section covers these two items except as to lands.

The act also requires that the Commission shall prepare an inventory of the entire property of every common carrier subject to the provisions of the act. The property of a railroad company usually embraces, in addition to its property which is used for common-carrier purposes, other property not so used. All this property must be listed by the Commission in its general inventory, but only that portion of it which is used by the carrier for its operative purposes is dealt with by the engineering section. The inventory which is treated of here includes, therefore, only operative property.

THE ENGINEERING INVENTORY

An inventory like that called for by the act may be produced in two ways:

1. The Commission may require the carrier to file an inventory of its property and may check that inventory when filed.

2. It may make the inventory itself, calling upon the carrier for such information and assistance as may be needed.

An examination of the valuation act makes it clear that Congress intended to provide for the investigation and marshaling of every fact which can bear upon the value of the property of the carriers. The basis of all that information is the inventory or list of the physical property of the carrier. The act provides that the Commission

shall from time to time revise and correct the valuations which it makes. It has been felt, therefore, that such an inventory should be prepared as will put beyond cavil the physical property which the carrier possessed at the date of such inventory, and that this inventory should be kept current to a like degree so long as may be necessary. The inventory presented must have been so prepared that it will command the confidence of all parties. That kind of an inventory is of underlying and permanent value; no other inventory can be final.

An inventory of this character can only be prepared after an inspection of the property. Some representative of the Commission must either see the property which is included or must ascertain such facts as demonstrate the existence of that property to a reasonable certainty. If an inventory is filed by the carrier, it must be checked by the Commission to this degree of certainty, and this would mean that the work of filing the inventory would be duplicated by the work of subsequently checking the same inventory. It was felt that the total expense of preparing the inventory would be less if made by the Commission in the first instance with such assistance from the carrier as could properly be called for and granted. This method avoids the duplication of effort and secures an inventory which can be vouched for by the Commission and which also reflects the claims of the carrier itself, at the least total outlay by which a result of that character could be obtained. . . .

COÖPERATION

The act requires carriers to furnish maps, profiles, plans, and other information of this sort as required by the Commission. It also enjoins upon carriers coöperation in the entire work. It has been the effort of the Commission to so prosecute its labors as to secure from the carrier a large measure of coöperation, and to this endeavor carriers as a rule have generously responded.

The Commission has required the carriers to prepare maps and profiles of their road in specified form. It was at first provided that these maps and profiles should be filed with the Commission either by depositing with it the original tracing or some mechanical reproduction of that tracing which would be equally distinct and durable. This was upon the theory that the Commission ought to have in its files such maps, but experience has shown that the interest of the public will be equally well served if the carrier prepares and preserves

132 GOVERNMENT AND RAILROAD TRANSPORTATION

these maps in some secure manner, furnishing to the government blue-print copies whenever required. This relieves the carriers from what they have considered a burden without detriment to the undertaking of the Commission. . . .

FORM OF INVENTORY

The valuation act requires an inventory in detail of each piece of property of the carrier. Since this requirement would be impossible of performance if construed narrowly a practical solution must be sought. What is "each piece of property" within the meaning of the act, how shall that property be enumerated, and what units shall be employed?

Since, in estimating cost of reproduction new, it will be necessary to apply to these units when assembled a price, it seems to follow that those units should be employed which are current in the purchase and sale of the property under consideration or are commonly used in construction contracts and settlements. . . .

SUBSTANCE OF THE INVENTORY

The engineering inventory contains only property which is used by the carrier for its purposes as a common carrier. Noncarrier property in the nature of real estate appears in the report of the land section. Stocks, bonds, and other property of that character, together with noncarrier physical property other than land, appear in the accounting report. The engineering inventory enumerates all the operative physical property of the carrier which is now in existence, except land, and embraces nothing which is not in existence. If, for example, in improving the alignment of the roadway a portion of the original embankment has been abandoned, the abandoned part is not inventoried.

Present topographical conditions are assumed to exist, except as they have been altered by the construction of the railroad itself, and it is further assumed that the general condition of the country as to forest, tillage land, drainage, etc., is that of valuation date.

The estimate of reproduction cost arrived at in this manner does not correspond with the original cost of producing the property as it was in fact produced. The present railroads of this country are the product of a process of gradual development. The narrow-gauge road has

passed into the standard gauge, the low class into the high class, the single track into the double track. Grades have been improved, curves eliminated. In the estimate of reproduction, all this is disregarded, and it is assumed that the existing property is reproduced by a single continuous impulse. . . .

DEPRECIATION

As treated by the Commission, depreciation may be defined as the lessening in cost value due to the smaller number of service units in the property as found, than in the same property new. An article when new contains, so to speak, a certain number of units of service; as those units are exhausted the article depreciates. When they are all used up the service life ends.

It is assumed that the loss of these units of service is evenly distributed throughout the entire life of the article. In point of fact this is not exactly true. Some articles may depreciate more rapidly in the early years of service and others in the last years, but the practical way is to assume that the loss is uniform, and it is believed that this as applied generally will produce a fair result. . . .

APPRECIATION

As already noted in the discussion of depreciation, most items entering into the construction and operation of a railroad begin to depreciate or lose in value and capacity for service almost from the first. To this the item of grading forms a notable exception. From the outset nearly everything embraced in this primary account begins to improve, and if properly maintained the improvement may continue for a considerable time. This is sometimes known as solidification and adaptation; in this discussion all forms of physical appreciation in the property are included under the comprehensive term "Appreciation." . . .

PRICES

When the engineering inventory is complete it contains an enumeration of the units of all the property owned or used by the carrier for common-carrier purposes, except land. In order to show cost of reproduction it is necessary to apply prices to these units. . . .

Preliminary to any discussion of prices lies the fundamental question, How are they to be determined; by what test is the reasonable-

ness of the price to be examined? The carriers contend that the only proper evidence of these prices is the opinion of an expert. If the price of engineering be in question, then an engineer must be called and his opinion taken. If the inquiry is upon the fair cost of grading, then a contractor must be produced, who should give his opinion upon this point. . . .

After careful consideration it was felt by the Commission that it would be unwise and unsafe to depend chiefly upon the opinion of experts; that the only certain foundation upon which to rest was the experience of the past. Unit prices, for example, are being applied as of June 30, 1914. The attempt is not to determine the exact price of a particular article on that date, for that price may have been abnormally high or low, but rather to ascertain what may be termed a normal price. For this purpose it was thought that the range of prices over a period of five years previous, and in some cases ten years, should be consulted. The Commission therefore passed an order, known as Order No. 14, requiring carriers to state the prices paid by them for materials and supplies of all kinds entering into the construction and operation of a railroad for five years previous to June 30, 1914, and in some instances for ten years, also the cost of certain kinds of labor. The prices called for were ordinarily those paid for four different purchases each year which were indicated by the order itself and not left to the selection of the carrier. The carrier was required to state the money payment which had been made. No estimate was permitted, or, if any estimate must be made of any part of the cost, the fact that it was an estimate must be stated. This return was prepared by the carrier from its records and sworn to.

This return was sometimes verified by the accountants of the Commission and sometimes accepted without such verification. A compilation was made showing in general the average price paid by carriers for the various articles embraced. That result was usually stated in terms f.o.b. the point of shipment, and in this way was obtained the average price paid by the principal carriers of the entire country for a given article at a given point.

This average furnishes the basis of the price applied by the Commission. It is not necessarily the exact price. In addition to prices obtained from the carriers, manufacturers have been consulted and statements have been furnished by them showing the prices at which standard goods had been sold to railroads during the same period. Members of the staff of the Commission often personally

interview such manufacturers and dealers with a view to ascertaining pertinent facts. . . .

The ascertainment of the cost of installation presents a more difficult problem, but one of the same kind. All labor costs involve elements of uncertainty and variability which make the ascertainment of such costs less easy, but here again it is felt that while the differences may be greater in individual cases, the general average furnishes a basis upon which the Commission may rest with confidence. The best measure of the cost of doing a piece of work on June 30, 1914, is what that work did in fact cost during the years immediately preceding that date.

The carriers were disposed to concede this, and offered to supply the Commission with a great number of completion reports giving in detail the cost of various projects. It was felt, however, that it would be impossible as a practical matter to compile and analyze all cases of this kind which would be furnished under an omnibus requisition, and that if the carrier was allowed to select there might be some possibility that the Commission would be furnished with jobs not fairly illustrative. Carriers were therefore requested to file with the bureau of valuation a list of all such projects which could be supplied, from which the bureau selected certain, chosen sometimes at random and sometimes because of the nature of the work embraced. Reports on these selected projects were made by the carriers in duplicate, one copy being sent to the engineer having jurisdiction over the district where the work was done and the other retained in the general office. A great number of reports of this character have been received. . . .

Our inventories are taken as of different dates, but all prices are applied as of June 30, 1914. The first thought was to apply prices as of the date of the inventory in each case, but subsequent reflection led to the conclusion that this course could not properly be pursued. . . .

OVERHEAD CHARGES

When an inventory has been prepared, including every item of physical property which enters into the construction of a railroad, and when a proper price has been applied to every item in that inventory covering both the expense of acquiring the property and of putting it in place as a part of the railroad, the result does not express the entire cost of the physical railroad itself for the reason that certain expenses connected with the production of this property have not been taken into account.

Before the building of the railroad or even the preliminary steps looking toward its building can be undertaken, a corporation is organized. There must be some entity to hire men and disburse money. The creation of this corporation entails the procuring of legal services and generally the payment of certain fees and other expenses. Engineers must be employed to locate the line, prepare contracts, supervise the construction, etc. There must be a general organization with the necessary employees for the purpose of conducting the work and making record of the details. Money must be provided for the payment of expenses as the work progresses and the interest on this money is in addition to the capital invested. It is evident that these items and others of a similar character call for the outlay of money, and that they are not represented in the inventory which has been prepared and priced. These items are ordinarily denominated "overhead charges" for the reason that they attach, not to any particular structure or part of the work, but to the work as a whole or at least to a certain class of that work. . . .

It will be seen . . . that from a money point of view it is of great importance that these charges should be intelligently considered. Seemingly in the past the amount of these charges has depended rather upon the impression of the engineer who applied them than upon any well ascertained basis of fact. It has been the attempt of the Commission to reach a conclusion grounded, not upon impression or inclination, but upon a substantial foundation. The attempt has been made to bring these charges under the same test which has been applied in the development of prices, namely, the actual experience of the past. . . .

THE LAND SECTION

The property of a railroad company may consist and usually does consist both of that which is used for transportation purposes and that which is not devoted to the public service but is strictly private property. The valuation act requires the Commission to report the entire property, both that which is used for transportation purposes and that which is not. The former is usually denominated carrier, the latter noncarrier.

The property of the carrier may again be divided into physical and nonphysical, the latter consisting of stocks, bonds, cash, etc. The engineering section, as already stated, deals with the physical property which is devoted to transportation purposes with the exception of land.

The land section deals with lands and, in case of noncarrier property, with all structures upon or connected with the land, including non-carrier structures upon carrier land.

The Commission is required to report the original cost and present value of noncarrier lands. In doing this the land and the structure are treated together. In no other way could a correct value be determined, for it often happens that the value of the land represents the entire value of the land and structure, the structure not being of a character suited to that place, and, upon the contrary, it may sometimes happen that land and structure together are not worth what the structure alone cost or what it would cost to reproduce the same. The land section may call upon the architects of the engineering section for assistance in valuing the structure, but the total value is not ascertained by adding together the reproduction cost less depreciation of the structure and the value of the land. What is reported is the market value of land and structure as they stand. . . .

CARRIER LANDS

Paragraph "First" of the valuation act requires the Commission to report original cost to date, cost of reproduction new, and cost of reproduction less depreciation of each piece of property owned or used by a common carrier for its purposes as a common carrier. If this paragraph stood alone it would clearly impose upon the Commission the duty of reporting the cost of reproducing the operative lands of the carrier.

Paragraph "Second" enumerates in detail the things which are to be reported as to the operative lands of the carrier. It is a maximum of statutory construction that a general provision may be modified by a particular provision in the same statute and when these two paragraphs are considered together it seems evident that all the facts as to which Congress required a report touching the right of way of the carrier are enumerated in paragraph "Second." If this is so, the Commission is not required to report in terms the cost to the carrier of acquiring at the present day its common-carrier lands.

This, however, is not of much practical importance, for paragraph "Second" requires the Commission to report, if not the cost of reproduction, at least what amounts to the same thing. That paragraph, which may for convenience be repeated here, is as follows :

Second. Such investigation and report shall state in detail and separately from improvements the original cost of all lands, rights of way, and terminals

owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

The meaning of the first part of this paragraph is plain. The Commission is required to state the original cost and the present value of all carrier lands. The meaning of the last provision is obscure.

It has been suggested that the purpose was to obtain a statement of the expense to the carrier of acquiring these lands aside from what was paid the landowner; that is, the cost of legal fees, of salaries of real-estate agents, of recording deeds, etc. But these facts, when ascertained, would not be of much significance, and such an interpretation entirely ignores the word "damages," which must also be reported. It is hardly supposable that this alone was what Congress intended.

The right of way of a carrier is frequently donated, but in so far as the carrier must acquire this by purchase or condemnation the cost generally exceeds the acreage value of the lands taken. This is partly due to the peculiar shape of the piece acquired and partly to other causes. This excess cost to the carrier is a thing of importance in the actual production of its railroad, and the carrier claims that it ought to be given weight in the estimate of reproduction. Evidently this was the fact for which Congress intended to inquire. What did it cost and what would it now cost the carrier to procure its right of way and other operative lands in excess of the market value of such lands by the acre?

If this construction is correct, the Commission is required to report as to the operative lands of a carrier the following facts:

1. Original cost.
2. Present value.
3. Cost of procuring right of way in excess of acreage value at the time of dedication to public use.
4. Cost of procuring right of way at the present time in excess of present acreage value.

Other portions of the act require certain other facts as to donations, land grants, etc., but these may be disregarded for the present. . . .

THE ACCOUNTING SECTION

The Commission's accountants deal with the records of the carrier, and the report of that section embraces everything called for by the act which is derived from an examination of the books of account and other records and documents. Among the subjects handled one of the most important is original cost to date.

ORIGINAL COST TO DATE

The paragraph of the valuation act entitled "First" provides that the Commission "shall ascertain and report in detail as to each piece of property owned or used by such common carrier for its purposes as a common carrier, the original cost to date. . . ."

As the act is interpreted by the Commission original cost is a fact, to be determined from the best evidence available in each case. The cost of reproduction new is of necessity an estimate, for the property never will be reproduced in fact and the exact expense of reproducing it cannot, therefore, be known. Depreciation is necessarily an estimate, for there is no way in which the exact amount of deterioration can be known. But these properties have been actually produced in the past and their production has cost a given amount of money. Original cost can, where the records suffice therefor, be exactly known, and it is in that sense that these words are understood by the Commission.

Investigation shows that original cost is frequently, indeed almost invariably, more or less than a fair average cost. Many causes contribute to this result. Poor judgment may have been used in the planning and executing of the project; accidents may have intervened; an unusually wet season may very much increase the cost of certain construction work; there may have been extravagance or even dishonesty; and all this would increase the expense above normal. Upon the other hand, all conditions may have been extremely favorable, and in consequence the work may have cost less than a fair average. The Commission in its report does not inquire what the work ought to have cost.

This fact is ordinarily ascertained from an examination of the books and records of the carriers, but other sources of information may be resorted to provided they indicate the fact. For example, the available records of contractors that built the property are

examined; records of reorganization committees and syndicates are studied; reports of state and Federal bodies and the records of court proceedings are reviewed. In some instances valuable information has been ascertained from authentic publications dealing with the early history of the property. This course is pursued only in cases where the records of the carrier are missing or deficient with respect to the expenditures for property. The search is for the best evidence of cost. If the fact cannot be determined within reasonable limits of accuracy, from evidence which carries with it a fair degree of certitude, the Commission so reports. . . .

It is possible to approach this problem from a different angle. Instead of inquiring what particular pieces of property cost, the Commission may state what has been the total investment in the property now in being. The Commission's accountants have usually approached the problem from this angle in case of older properties, with more satisfactory results. In showing this kind of original cost the accountant endeavors to determine the source from which the money is derived. It may have been paid in for the issue of securities or upon some other consideration; it may have come from the earnings of the property by appropriating income which might otherwise have been divided as dividends; additions and betterments have often been paid for out of revenues. Whenever the records of the carrier clearly show that a given amount has actually gone into the purchase of property and the source from which this was derived, our report indicates both the amount and the source.

Generally it is possible to know with reasonable accuracy the total amount which has been invested in the development of the enterprise. This, however, may have been expended for property which is not now in existence and does not, therefore, represent the original cost of the property in being. To obtain this result proper deduction must be made on account of retirements. Whenever the fact of the retirement can be located from the records of the carrier and the cost can be determined it is deducted, but in many cases this cannot be done. It will be seen, therefore, that this figure will represent before retirements have been written out the total investment in the enterprise; that is, the amount of money which has gone in and no part of which has been taken out as money. When the proper retirements have been made the result is the original cost of the property in existence, assuming those retirements to have been all identified and the

original cost properly determined. It is believed that this figure is of great value, but it must not be understood that it precisely represents original cost, for it does not.

AIDS, GIFTS, GRANTS, AND DONATIONS

Large contributions have been made both by public authority and from private sources in aid of the construction of our railroads. The act requires an investigation and report upon this subject, which is mainly handled by the accounting section.

Each carrier is required to file a return of its lands showing among other things, with respect to each parcel, the consideration paid. This return is verified by the accountant who examines the books and records of the carrier, not only for the purpose of ascertaining whether the facts stated in the return are supported, but also what other facts may be disclosed. With respect to most carriers donations of land are in this way known with substantial accuracy, although in case of the older roads, especially in the South, where the records were destroyed during the Civil War, it is frequently impossible to obtain the information.

Carriers are also required to file a return showing all aids other than land. The books and records of the carrier are examined by the accountant in the light of this return and whatever they disclose is developed and reported. . . .

Land grants are treated as a separate proposition, the report covering the total grant, the amount received from lands already sold, and the value of those remaining unsold. This last value is necessarily an estimate.

CORPORATE HISTORY

In the development of the railroad systems of this country there have been numerous consolidations, reorganizations, leases, etc. The Boston & Maine system, for example, which comprises less than 2500 miles, involves 167 corporations. The act requires an investigation and report as to this corporate history.

This subject is dealt with by the accounting section. The date of organization of each corporation, what property was constructed by it, what became of that property, and of the corporation itself is

142 GOVERNMENT AND RAILROAD TRANSPORTATION

recited. The report of the accountant gives a complete picture of the corporate growth of the system from the beginning down to the date of valuation.

In the same connection a full statement is made of all issues of stocks and bonds by each corporation, together with an account of the consideration either in money or in property which was paid for the same. The means resorted to by the carrier for the providing of its funds, the amounts paid in the way of discounts, and, indeed, everything connected with the financial history is fully shown.

It will be seen that the accountant develops whatever facts are contained in the records of the carrier and it is believed that the facts thus developed are of great significance in exhibiting what may be termed the financial equities of each case.

REASONS FOR THE DIFFERENCES BETWEEN VALUES

By the act the Commission is required to report not only an analysis of the methods by which the several cost values are obtained but also the reasons for their differences, if any. From what has been stated in this analysis of methods, it must be clear that the reasons for the differences in amount between the various cost values reported, i.e. the original cost to date, the cost of reproduction new, and the cost of reproduction less depreciation, are to be found in the essential differences in the nature of the inquiries which must be made in order to ascertain each of those cost values, respectively, based as they are and must be on varying assumptions, attended by varying conditions in which the actual and the hypothetical are contrasted, and affected by fluctuations and trends in the prices of labor and materials.

[C]

United States *v.* Los Angeles R. R.

United States Supreme Court (1927), 273 U.S. 299

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The suit was brought in the Federal court for southern California by the Los Angeles and Salt Lake Railroad Company to enjoin and annul an order of the Interstate Commerce Commission purporting to determine the "final value" of its property, under what is now

Section 19a of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, as amended by the Valuation Act, March 1, 1913, c. 92, 37 Stat. 701, by the act of February 28, 1920, c. 91, Section 433, 41 Stat. 456, 474, 493, and by the act of June 7, 1922, c. 210, 42 Stat. 624. San Pedro, Los Angeles and Salt Lake Railroad Co., 75 I. C. C. 463; 97 I. C. C. 737; 103 I. C. C. 398. The bill asserts that the order fixing the final value is invalid, because it is in excess of the powers conferred upon the Commission, is contrary to the provisions of the Valuation Act, and violates the Fifth Amendment. It asserts also that irreparable injury is threatened.

Reasons why the final valuation is invalid are set forth specifically in 31 paragraphs and 35 subparagraphs of the bill. It charges that the Commission adopted rules for the valuation which are unsound and unwarranted in law; that in the determination of values it ignored facts and factors of major importance; that it refused to report an analysis of the methods employed by it, although required so to do by the Valuation Act; and that it refused to comply with the requirement that all values and elements of value be separately reported. It charges that the valuation was made as of June 30, 1914, whereas it should have been made as of June 7, 1923; that the value found is that for rate-making purposes, whereas the finding should have been a general one of value for all purposes; that properties enumerated were erroneously excluded from the valuation; that in making the finding of value the Commission erroneously failed to consider nine specified elements of value; that in making the finding of investment in road and equipment it ignored six items; that in making the finding of cost of reproduction new it ignored eleven items; that in making the finding of cost of reproduction new less depreciation it made thirteen errors; that in valuing the lands eleven errors were made; and that in making the finding as to working capital a large sum was arbitrarily deducted. It alleges that for these and other reasons the findings made are incomplete, erroneous in law and misleading in point of fact. . . .

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the

formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare *Smith v. Interstate Commerce Commission*, 245 U.S. 33. Moreover, the investigation made was not a step in a pending proceeding in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future — preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the legislature or an administrative board of a state. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

The Valuation Act requires that the investigation and study be made of the properties of each of the rail carriers. They are about 1800. 40 Annual Report Interstate Commerce Commission, 13. In directing the Commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made, and constituted the "final valuation" and "the classification thereof" *prima facie* evidence, in controversies under the Act to Regulate Commerce. Every party in interest is, therefore, entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed. *Kansas City Southern Ry. Co. v. Interstate Commerce Commission*, 252 U.S. 178. But Congress did not confer upon the courts power either to direct what this "tribunal appointed by law and informed by experience" (*Illinois Central Ry. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454) shall find, or to annul the report, because of errors committed in making it. Moreover, errors may be in the final valuation of the property of each of the nearly 1800 carriers. And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved or in which the errors alleged will be of legal significance.

The mere fact that Congress has, in terms, made "all final valuations . . . and the classification thereof . . . *prima facie* evidence of the value

of the property in all proceedings under the Act to Regulate Commerce . . . in all judicial proceedings for the enforcement of the act . . . and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part any order of the Interstate Commerce Commission" is, obviously, not a violation of the due-process clause justifying proceedings to annul the order. That to make the Commission's conclusions *prima facie* evidence in judicial proceedings is not a denial of due process, was settled by *Meeker v. Lehigh Valley R. R. Co.*, 236 U.S. 412, 430, 431. It was there said of a like provision relating to reparation orders: "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence." . . .

Nor does the fact that "all final valuations . . . and the classifications thereof" are made *prima facie* evidence prevent the report from being solely an exercise of the function of investigation. Data collected by the Commission as a part of its function of investigation constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered. . . . Inquests and inquisitions, if they are expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence. 3 *Wigmore on Evidence* (2d ed.), Sections 1671-1674. Some inquests are at common law also *prima facie* evidence of the facts found. *Hughes v. Jones*, 116 N. Y. 67.

Congress has provided adequate remedies for the correction of errors in the final valuation and the classification thereof. The conclusions reached by the Commission must be submitted first in the form of a tentative report, Section 19a, paragraphs (f) and (h). When so submitted, the carrier is authorized to file a protest and to be heard thereon, paragraph (i). If such a protest is filed, the Commission is directed to make in the report such changes, if any, as it may deem proper. Even if no protest is filed, the Commission may of its own motion upon due notice to parties in interest correct the tentative report. Compare *New York, Ontario & Western Ry. Co. v. United States*, 273 U.S. 652. When the final report is introduced in evidence the opportunity to contest the correctness of the findings therein made is fully preserved to the carrier; and any error therein may be corrected at the trial. Specific findings may be excluded because of errors committed in making them. It is conceivable that errors of law may have

been committed which are so fundamental and far-reaching as to deprive the "final valuations . . . and the classification thereof" of all probative force. Moreover, additional evidence may be introduced. Paragraph (j) provides that "if upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting the value," the proceedings shall be stayed so as to permit the Commission to consider the same and fix a final value different from that fixed in the first instance, and to "alter, modify, amend or rescind any order which it has made involving such final value."

The district court rested jurisdiction to entertain a suit to set aside the valuation order largely upon the provisions of paragraph (j), believing that such a suit was within the scope of the words "upon the trial of any action involving a final value." That paragraph was intended to apply to actions brought to set aside rate-fixing orders in which the question of the value of the carrier's property would be material. In our opinion it is not applicable to so-called orders fixing only valuations. The objection to entertaining this suit to annul the final valuation is not merely that the question presented is moot, as in *United States v. Alaska Steamship Co.*, 253 U.S. 113, 116; or that the plaintiff's interest is remote and speculative as in *Hines Yellow Pine Trustees v. United States*, 263 U.S. 143, 148. There is the fundamental infirmity that the mere existence of error in the final valuation is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act.

Little need be added concerning the further contention that the suit should be entertained under the general equity power of the court. Two arguments are urged in support of the proposition. One is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may itself be misled into illegal action by the erroneous conclusions and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to Section 15a of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, Section 421, 41 Stat. 456; in prescribing divisions of joint rates under Section 15; in determining the limit upon the amount of capitalization, in the event of a consolidation under Section 5; in determin-

ing the propriety of an issue of securities, under Section 20a; or as the basis of computation of the amount of excess earnings to be recaptured under Section 15a. Neither argument is persuasive. The first reminds of the effort made in *Pennsylvania R. R. Co. v. United States Railroad Labor Board*, 261 U.S. 72, to suppress the report of that board. The second reminds of the attempt to secure a declaratory judgment in *Liberty Warehouse Co. v. Grannis*, 273 U.S. 70; and, also, of cases in which it was sought to enjoin a municipality from passing an illegal ordinance. Compare *New Orleans Waterworks Co. v. New Orleans*, 164 U.S. 471, 481; *McChord v. Louisville & N. Ry. Co.*, 183 U.S. 483.

No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. Whether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy, we need not determine.

Reversed.

MR. JUSTICE BUTLER took no part in the consideration or decision of this case.

QUESTIONS

1. Define "value."

2. What are the various elements that determine the value of a ton of steel? 100 shares of Radio Corporation of America stock? 1000 bushels of wheat? 100 shares of Baltimore & Ohio Railroad stock? a 320-acre farm in Iowa? a residence in a small town? the Union Pacific Railroad?

3. How is assessed valuation for taxing purposes determined? Does the method used to determine the value of farms differ from that used to fix the value of city skyscrapers? the value of interstate railroads?

4. What is value for condemnation purposes? How is it determined?

5. How does value for rate-making purposes differ from value for taxation? from value for condemnation?

6. To what types of business is value for rate-making purposes of importance?

7. What are the uses to be made of the valuation provided for in the Valuation Act of 1913?

148 GOVERNMENT AND RAILROAD TRANSPORTATION

8. What is the difference between cost of reproduction new and cost of reproduction less depreciation?

9. How does each of the above differ from original cost to date?

10. To what extent may the Interstate Commerce Commission demand the assistance of the carriers in its work of valuation?

11. Why did the act provide that the Commission should consider the cost of real property separately from that of other property?

12. What methods has the Commission used in reporting land values? Explain the purpose of each of these methods.

13. What methods does the Commission use in publishing its reports on valuation?

14. The Interstate Commerce Commission in fixing a tentative valuation fails to consider and include "the present cost of condemnation and damages or of purchase in excess of such original cost or present value" of the lands of a carrier. Suit is brought to obtain a mandamus to compel the Commission to hear proof presented on the subject and to act upon it. Decide.

15. Has a carrier the legal right to demand that the records and data compiled by the Commission in the course of valuation proceedings be placed at its disposal in order that it may prepare argument for a hearing to have a preliminary value annulled? What is the effect of the Commission's order that certain of the studies and analyses prepared by the Bureau of Valuation should not be open to anyone outside the Commission's employ? What justification has a railroad for expecting the Commission to give it access to the studies of the bureau?

16. As soon as a tentative valuation was announced by the Commission, a railroad started court proceedings to have it annulled. Under what conditions will such an action be successful? What other steps might the railroad take?

17. Is it proper to include in the value of a road a specific sum for its value as a going concern?

18. A carrier's receipts in cash over a three-year period anticipated its demands for cash by at least ten days. Is an allowance for an investment in cash as working capital a proper part of the carrier's valuation?

19. When may a carrier attack in the courts its final value as fixed by the Commission?

20. Under what conditions may a court order the Commission to change the results of a valuation?

21. In November, 1921, a state commission made a valuation of a public utility. It determined its final figure after a consideration of both original cost and cost of reproduction less depreciation. In this figure it did not include all the increase in value of the property owned before 1914. Rates were based on the commission's valuation. The utility claimed that the commission's action was confiscatory. Decide.

b. VALUE FOR RATE-MAKING PURPOSES

[A]

[The pertinent statutory provisions are found in Section 15a of the Interstate Commerce Act, paragraphs 1-6 (I. C. Act, pp. 44-47).]

[B]

St. Louis & O'Fallon Railway Company v. United States

United States Supreme Court (1929), 73 L. ed. (Adv. Opin.) 457

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

These are cross appeals from the final decree of the District Court, Eastern Missouri — three judges sitting — in a suit to annul an Interstate Commerce Commission order, dated February 15, 1927, which directed St. Louis & O'Fallon Railway Company to place in a reserve fund one half of its determined excess income for the years 1920 (10 months), 1921, 1922, and 1923 (that is half of the sum by which the net railway operating income for each of those years exceeded 6 per cent of the ascertained value of property devoted to public service); and to pay to the Commission the remaining one half with 6 per cent interest beginning four months after termination of the year, i. e. May 1, 1921, 1922, 1923 and 1924. . . .

After an investigation instituted under Section 15a, May 14, 1924, for the purpose of determining incomes received by St. Louis & O'Fallon Railway Company (The O'Fallon) and Manufacturers' Railway Company (The Manufacturers'), asserted to be parts of one system, for the years 1920-1923, the Commission found: (1) Although the stock of both corporations was mostly owned by the Adolph Busch Estate and their principal officers were the same, they were not carriers operated under common control and management as a single system within paragraph 6. (2) The Manufacturers' had received no excess operating income. (3) The value of The O'Fallon's property devoted to public service in 1920 (10 months) was \$856,065; in 1921, \$875,360; in 1922, \$978,874; in 1923, \$997,236; and during each of those years it received net operative income exceeding 6 per cent upon the stated valuation.

The above-described recapture order followed. . . .

Wisconsin Railroad Commission *v.* Chicago, Burlington & Quincy R. R. Co., 257 U.S. 563, and Dayton-Goose Creek Railway Co. *v.*

The United States, 263 U.S. 456, point out the general purpose of the Transportation Act, 1920, and uphold the validity of Section 15a.

The Manufacturers' is a switching road with 30 miles of track within St. Louis, Missouri. The O'Fallon — a coal-carrying road — has nine miles of main line, all in Illinois, and this connects with the Terminal Railroad at East St. Louis. Through the latter deliveries are made to sundry points in St. Louis, some of which are on the Manufacturers' line. "The distance between the railroad of the O'Fallon and the railroad of the Manufacturers' is about 12 miles, and all communication by rail between the two properties is effected over the tracks of the Terminal, including a bridge over the Mississippi River." Both the Commission and the District Court held that the record failed to show these two roads were under common control and management and operated as a single system within the meaning of paragraph 6. We accept their conclusion.

The Commission directed the O'Fallon to pay 6 per cent interest on the recaptured one half of its ascertained excess net railway operating income beginning four months from the end of the year during which the excess accrued (Sect. 6). The District Court rightly ruled that as the carrier made bona-fide denial of any excess under circumstances sufficient to justify a contest, no interest should have been imposed for any time prior to the final order. Not until then could the carrier know what, if anything, it should pay.

Also, we think the District Court rightly rejected the claim that excess earnings were not recapturable unless and until the Commission had fixed a general level of rates intended to yield fair return upon the aggregate value of carrier property either as a whole, or in some prescribed rate or territorial group. Congress, of course, realized that final valuations would require prodigious expenditure of time and effort; but the language concerning recapture indicates that prompt action was expected. Practical application of paragraphs 5 and 6 does not necessarily depend upon prior compliance with paragraphs 2 and 3. The act should be construed so as to carry out the legislative purpose. The proviso of paragraph 3 prescribing action to be taken during two years beginning March 1, 1920, and the clause of paragraph 6 excepting the income of certain roads prior to September 1, 1920, are hardly compatible with this claim by the carrier.

Paragraph 4, Section 15a, directs that in determining values of railway property for purposes of recapture the Commission "shall give due consideration to all the elements of value recognized by the

law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes." This is an express command; and the carrier has clear right to demand compliance therewith. *United States ex rel. Kansas City Southern Railway Co. v. Interstate Commerce Commission*, 252 U.S. 178.

"The elements of value recognized by the law of the land for rate-making purposes" have been pointed out many times by this court. *Smyth v. Ames*, 169 U.S. 466; *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19; *Minnesota Rate Cases*, 230 U.S. 352; *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276; *Bluefield Water Works & Improvement Co. v. Public Service Commission*, 262 U.S. 679; *McCardle v. Indianapolis Water Co.*, 272 U.S. 400. Among them is the present cost of construction or reproduction.

Thirty years ago, *Smyth v. Ames* announced (546) :

We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

In *Southwestern Bell Telephone Co. v. Public Service Commission* (287), we said :

It is impossible to ascertain what will amount to a fair return upon properties devoted to public service without giving consideration to the cost of labor, supplies, etc., at the time the investigation is made. An honest and intelligent forecast of the probable future values made upon a view of all the relevant circumstances is essential. If the highly important element of present costs is wholly disregarded such a forecast becomes impossible. Estimates for tomorrow cannot ignore prices of today.

The doctrine above stated has been consistently adhered to by this court.

The report of the Commission is long and argumentative. Much of it is devoted to general observations relative to the method and purpose of making valuations; many objections are urged to doctrine approved by us; and the superiority of another view is stoutly asserted. It carefully refrains from stating that any consideration whatever was given to present or reproduction costs in estimating the value of the carrier's property. Four dissenting Commissioners declare that reproduction costs were not considered; and the report itself confirms their view. Two of the majority avow a like understanding of the course pursued.

The following from the dissenting opinion of Commissioner Hall, concurred in by three others, accurately describes the action of the Commission:

In order to determine the value of the O'Fallon property devoted to carrier service during the recapture periods, 10 months in the year 1920 and the years 1921, 1922, and 1923, we start with a valuation or inventory date of June 30, 1919. The units in existence on that date are known. Original cost of the entire property cannot be ascertained. As to the man-made units we estimate the cost of reproducing them in their condition on that date and in so doing apply to the units installed prior to June 30, 1914, the unit prices of 1914, representing a fairly consistent price level for the preceding 5 or 10 years. To like units, installed after June 30, 1914, and prior to June 30, 1919, we apply the same prices, but add a sum representing price increases on those units during that period. For the third period, from June 30, 1919, down to each recapture date, we abandon estimate and turn to recorded net cost of additions less retirements. On this composite, made up of estimated value for two periods and ascertained net cost for the third period, the majority base a conclusion as to value at recapture date of the man-made items. Land goes in at its current value as measured by that of neighboring lands.

Without summarizing the other processes, all clearly stated in the majority report, it will be observed that the rate-making value arrived at for the successive recapture periods, as for example the year 1923, rests upon 1923 market value of lands; costs of other property installed since June 30, 1919; unit prices of 1914, enhanced by allowance for increased cost of units installed during June 30, 1914-1919; and, for the units installed prior to June 30, 1914, constituting by far the major part of the property, unit prices of 1914 without any enhancement whatever. As to this major part of the carrier's property devoted to carrier purposes in 1923 no consideration is given to costs and prices then obtaining or to increase therein since 1914. (124 I. C. C. 60)

In the exercise of its proper function this court has declared the law of the land concerning valuations for rate-making purposes. The Com-

mission disregarded the approved rule and has thereby failed to discharge the definite duty imposed by Congress. Unfortunately, proper heed was denied the timely admonition of the minority — "The function of this commission is not to act as an arbiter in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction."

The question on which the Commission divided is this: When seeking to ascertain the value of railroad property for recapture purposes, must it give consideration to current, or reproduction, costs? The weight to be accorded thereto is not the matter before us. No doubt there are some, perhaps many, railroads the ultimate value of which should be placed far below the sum necessary for reproduction. But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed.

It was deemed unnecessary by the court below to determine whether the Commission obeyed the statutory direction touching valuations since the order permitted the O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid. The only power to make any recapture order arose from the statute.

The judgment of the court below must be reversed. A decree will be entered here annulling the challenged order.

Reversed.

MR. JUSTICE BUTLER took no part in the consideration or determination of this cause.

MR. JUSTICE BRANDEIS, dissenting.

[This opinion is supplemented by ninety-five footnotes which give additional data on many of the points treated in the opinion and refer to sources of the material used. Lack of space makes it necessary to omit these footnotes.]

The main question for consideration is that of statutory construction. By Transportation Act, 1920, February 28, 1920, c. 91, Section 15a, 41 Stat. 456, 488, Congress delegated to the Interstate Commerce Commission the duty to establish and maintain rates which will yield "a fair return upon the aggregate value of the railway property" of

the United States. By paragraph 4 thereof, it directs that in ascertaining value the Commission shall "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes"; and shall "give to the property investment account only that consideration which under such law it is entitled to in establishing values for rate-making purposes." The report of the Commission, which accompanies the order challenged, declares: "In the methods of valuation which we have followed in this proceeding we have endeavored to give heed to this direction [that contained in paragraph 4]. . . ." *Excess Income of St. Louis & O'Fallon Ry. Co.*, 124 I. C. C. 3, 19. Speaking for the dissenting members, MR. COMMISSIONER HALL said: "If the law needs change, let those who made it change it. Our duty is to apply the law as it stands" (pp. 63, 64). And MR. COMMISSIONER AITCHISON added: "If we anticipate grave results will follow, our responsibility will be fully met if we suggest to the Congress, under our statutory powers to recommend new legislation to that body, the enactment of a rule for rate making under the commerce clause which will have no such unfavorable effects" (p. 64).

Section 15a makes no specific reference either to the original cost of the property, or to prudent investment, or to current reproduction cost, or to the then existing price level. Section 19a (the valuation provisions of the Act of 1913), to which Section 15a refers, directs the Commission to report, among other things, "in detail as to each piece of property, . . . the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation"; and also "other values, and elements of value." After the enactment of Section 15a and before entry of the order challenged, it was held in *Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, a case arising under a state law, that the rate-base on which a public utility is constitutionally entitled to earn a fair return is the then actual value of the property used and useful in the business, not the original cost or the amount prudently invested in the enterprise. The government concedes that current reproduction cost is admissible as evidence to show present value under Section 15a. The carrier concedes now that neither Congress, nor the common law, made current reproduction cost the measure of value. The question on which the Commission divided is this: Did Congress require the Commission when acting under Section 15a to give, in all cases and in respect to all property, some, if not controlling, effect to evidence establishing the estimated current cost of reproduction? Or did Congress intend to leave to the Commission the

authority to determine, as in passing upon other controverted issues of fact, what weight, if any, it should give to that evidence? . . .

The claim of the O'Fallon is in substance that, since construction costs were higher during the recapture periods than in 1914, the order should be set aside, because the Commission failed to find that the existing structural property and equipment which had been acquired before June 30, 1914, was worth more than it had been then. The Commission undertook, as will be shown, to find present actual value and, in so doing, both to follow the direction of Congress and to apply the rule declared in the Southwestern Bell case. It is true that this court there declared that current reconstruction cost is an element of actual value; and that Congress directed the Commission "to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes." But, while the act required the Commission to consider all such evidence, neither Congress nor this court required it to give to evidence of reconstruction cost a mechanical effect or artificial weight. They left untrammelled its duty to give to all relevant evidence such probative force as, in its judgment, the evidence inherently possesses. The Commission concluded that in respect to the evidence of reproduction costs the differences between the Southwestern Bell case and that at bar were such as to lead to different results in the two cases. It did so mainly because "in the administration of the valuation and recapture provisions," ascertainment of value "is affected by a vast variety of considerations that either do not enter into, or are less easily perceived in, problems incident to the regulation of local public utilities" (p. 27). In my opinion the conclusions of the Commission are well founded. To make clear the reasons, requires consideration of the function of the Commission in applying Section 15a and of the problems with which it is confronted.

First. The Commission is a fact-finding body. The question whether it must give to confessedly relevant facts evidential effect is solely one of adjective law. Statutes have sometimes limited the weight or effect of evidence. They have often created rebuttable presumptions and have shifted the burden of proof. But no instance has been found where under our law a fact-finding body has been required to give to evidence an effect which it does not inherently possess. Proof implies persuasion. To compel the human mind to infer in any respect that which observation and logic tell us is not true interferes with the process of reasoning of the fact-finding body. It would be a departure

from the unbroken practice to require an artificial legal conviction where no real conviction exists.

An arbitrary disregard by the Commission of the probative effect of evidence would, of course, be ground for setting aside an order, as this would be an abuse of discretion. Orders have been set aside because entered without evidence; or because matters of fact had been considered which were not in the record; or because the Commission excluded from consideration facts and circumstances which ought to have been considered; or because it took into consideration facts which could not legally influence its judgment. But no case has been found in which this court has set aside an order on the ground that the Commission failed to give effect to evidence which seemed to the court to be of probative force, or on the ground that the Commission had drawn from the evidence an inference or conclusion deemed by the court to be erroneous. On the contrary, findings of the Commission involving the appreciation or effect of evidence have been treated with the deference due to those of a tribunal "informed by experience" and "appointed by law" to deal with an intricate subject. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454. Unless, therefore, Congress required the Commission, not only to consider evidence of reconstruction cost in ascertaining values for rate-making purposes under Section 15a, but also to give, in all cases and in respect to all property, some weight to evidence of enhanced reconstruction cost, even if that evidence was not inherently persuasive, the Commission was clearly authorized to determine for itself to what extent, if any, weight should be given to the evidence; and its findings should not be disturbed by the court, unless it appears that there was an abuse of discretion.

Second. While current reproduction cost may be said to be an element in the present value of property, in the sense that it is "evidence properly to be considered in the ascertainment of value," *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, 156, it is clear that current cost of reproduction higher than the original cost does not necessarily tend to prove a present higher value. Often the fact of higher reconstruction cost is without any influence on present values. It is common knowledge that the current market value of many office buildings and residences constructed prior to the World War have failed to reflect the greatly increased building costs of recent years, although the need of new buildings of like character was being demonstrated by the large volume of construction at the

higher price level. Many railroads built before the World War have never been worth as much as their original cost, because high construction cost combined with adverse operating conditions and limited traffic have at all times prevented their earning, despite reasonable rates, a fair return on the original cost. The Puget Sound extension of the Chicago, Milwaukee and St. Paul is a notable example. Many branches, and indeed whole lines of railroad, have been scrapped since 1920. Abandonment of 2439 miles of railroad was authorized under paragraph 18 of Section 1 of the Interstate Commerce Act between 1920 and 1925; and in the three following years 2010 miles more. These properties had, in the main, become valueless for transportation, either because traffic ceased to be available or because competitive means of transportation precluded the establishment of remunerative rail rates. Obviously, no one would contend that their actual value just before abandonment was what it originally cost to construct them or what it would then have cost to reconstruct them.

Third. The terms of Section 15a and its legislative history preclude the assumption that Congress intended by paragraph 4 to deny to the Commission in respect to evidence of reconstruction cost the discretion commonly exercised in determining what weight, if any, shall be given to an evidential fact. In 1920, no fact was more prominent in the mind of the public and of Congress than that the cost of living was far greater than that prevailing when the existing railroads were built. But, neither in Transportation Act, 1920, nor in any committee report, is there even a suggestion that the Commission would be required to give to that fact any effect in ascertaining values for rate-making purposes under Section 15a. If it had been the intention of Congress to compel the Commission to increase values for rate-making purposes because the price level had risen, it would naturally have incorporated such a direction in the paragraph. On the other hand, the committee reports and the debates show that the opinion was quite commonly held that the actual values were less than the property investment account appearing on the books of the carriers; and the proposal made by the railroads that the investment account be accepted as the measure of value was resisted as being excessive. The property-investment account in 1920 was about nineteen billions of dollars. The then reproduction cost of the railroads, applying index figures to estimated actual cost, was over forty billions. It is inconceivable that Congress, after rejecting property investment account as excessive, intended by Section 15a to make mandatory on the

Commission the consideration of elements which would give a valuation double that which had been rejected. The insertion in Section 15a of the provision that the Commission "shall give to the property investment account of the carriers only that consideration which under the law it is entitled to in establishing values for rate-making purposes" and the rejection of other proposed measures of value show that Congress intended not to impose restrictions upon the discretion of the Commission.

Congress did intend to provide a return on the existing railroad property which should be only slightly more than that which had been enjoyed during the six preceding years. To have required that the then price level be reflected in the values to be fixed under Section 15a would have resulted in a rate-base of double the property investment account of the carriers. For the cost of living was then about double prewar prices. The prescribed fair return applied to such a rate-base would have produced more than double the average net earnings from operation of the several properties during the three years preceding Federal control; more than double the amount which the carriers agreed to accept under the Federal Control Act, March 21, 1918, c. 25, Section 1, 40 Stat. 451, as fair compensation for the use of their property; more than double the guarantee provided by Transportation Act, 1920, Section 209, for the six months' period after the surrender of control. The sum which the railroads had thus earned net in those six years equalled 5.2 per cent on the property investment account, as carried on their books.

In making provision for a fair return, the main purpose was not to increase the earnings of capital already invested in railroads, but to attract the new capital needed for improvement or extension of facilities. This was to be accomplished by raising the rate of return from 5.2 per cent to 5.5 per cent (Senate Reports, Vol. I, No. 304, Sixty-sixth Congress, 1st Session):

The basis adopted by the committee is three-tenth of 1 per cent higher than the basis of the test period [the three years preceding June 30, 1917]; and assuming, though not conceding that the value of the property is equal to the property investment accounts, it will yield for all the railways a net operating income of \$54,000,000 in excess of the income of the test period. There were two considerations which led the majority of the committee to believe that this increase is not only warranted but necessary:

First. The railways are being returned to their owners when everything is unsettled and abnormal; when there is suspicion and distrust everywhere.

Just what rate of return will enable the carriers to finance themselves under such conditions cannot with certainty be determined. It was felt, therefore, that some increase over the prewar period was justifiable.

Second. As compared with all kinds of commodities, money is much less valuable than it was a few years ago, and it would seem to be only fair that the returns from railway investments should be reasonably advanced.

The means by which the bill was to accomplish the desired end are thus stated in the report :

First : By prescribing a basis of return upon the value of the railway property, to give such assurance to investors as will incline them to look with favor upon railway securities ; that is to say, by making a moderate return reasonably certain to establish credit for the carriers.

Second : In making the return fairly certain to secure for the public a lower capital charge than would otherwise be necessary.

Third : In requiring some carriers, which under any given body of rates will earn more than a fair return, to pay the excess to the Government and in so using this excess that transportation facilities or credit can be furnished to the weaker carriers, and thus help to maintain the general system of transportation.

Either increase in the rate of return or increase of the base on which that return is measured would have served to adjust compensation to higher price levels. The adoption by Congress of the increase in the return, as the means of compensating for the decreased purchasing power of the dollar, precludes the assumption that it intended that the valuation should reflect that lessened purchasing power. By explicitly choosing the former Congress implicitly rejected the latter. For to have allowed an increase in both would have gone beyond adjusting earnings to increased costs and have made this increase a mere pretext for allowing unwarranted profits to the railroads. The proceedings which led to the passage of the act makes it clear that Congress intended no such result.

Fourth. The declared purpose of Congress in enacting Section 15a was the maintenance of an adequate national system of railway transportation, capable of providing the best possible service to the public at the lowest cost consistent with full justice to the private owners. Following the course consistently pursued by this court in applying other provisions of the Interstate Commerce Act, *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 211, 219 ; *New England Divisions Case*, 261 U.S. 184, 189-190 ; *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 478, the Commission construed

Section 15a in the light of the declared purpose of Congress and of the economic factors involved. From its wide knowledge of actual conditions and its practical experience in rate making, it concluded that to give effect to enhanced reproduction costs would defeat that purpose (p. 27).

It knew that the value for rate-making purposes could not be more than that sum on which a fair return could be earned by legal rates; and that the earnings were limited both by the commercial prohibition of rates higher than the traffic would bear and the legal prohibition of rates higher than are just and reasonable. It knew that a rate-base fluctuating with changes in the level of general prices would imperil industry and commerce. It knew that the adoption of a fluctuating rate-base would not, as is claimed, do justice to those prewar investors in railroad securities who were suffering from the lessened value of the dollar, since the great majority of the railroad securities are represented by long-term bonds or the guaranteed stocks of leased lines which bear a fixed return; and that only the stockholders could gain through the greater earnings required to satisfy the higher rate-base. It recognized that an adequate national system of railways, so long as it is privately owned, cannot be provided and maintained without a continuous inflow of capital; that "obviously, also, such an inflow of capital can only be assured by treatment of capital already invested which will invite and encourage further investment" (p. 30); and that as was said in *Dayton-Goose Creek Ry. Co. v. United States*, 263 U.S. 456, 481: "By investment in a business dedicated to the public service the owner must recognize that as compared with investment in private business, he cannot expect either high or speculative dividends but that his obligation limits him to only fair or reasonable profit."

The conviction that there would in time be a fall in the price level was generally held. As a fluctuating rate-base would thus directly imperil industry and commerce and investments made at relatively high price levels during and since the World War; would tend to increase the cost of new money required to supply adequate service to the public; and would discourage such investment, the Commission concluded that Congress could not have intended to require it to measure the value or rate-base by reproduction cost, since this would produce a result contrary to its declared purpose. And as confirming its construction of Section 15a the Commission showed that, with the stable rate-base which it had accepted as the basis for administering

the act, the aim of Congress to establish an adequate national system had been attained. It pointed out that :

During the period 1920-1926, inclusive, the investment in railroad property increased by four billions of dollars. A substantial part of this money was derived from income, but much of it was obtained by the sale of new securities. The market for railroad securities since the passage of the Transportation Act, 1920, has steadily improved and the general trend of interest rates has been downward. The credit of the railroads in general is now excellent . . . (p. 33).

Fifth. Other considerations confirm the construction given by the Commission to the phrase "value for rate-making purposes," as used in Section 15a. In condemnation proceedings, the owner recovers what he has lost by the taking of the property (*Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195); and such loss must be determined "not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted." *Boom Co. v. Patterson*, 98 U.S. 403, 408. Compare *Louisville & Nashville R. R. Co. v. Barber Asphalt Co.*, 197 U.S. 430, 435. But the actual value of a railroad — its value for rate-making purposes under Section 15a — may be less than its condemnation value. As was said in *Southern Ry. Co. v. Kentucky*, 274 U.S. 76, 81-82, a case involving state taxation :

The value of the physical elements of a railroad — whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure — is not the sole measure of or guide to its value in operation. *Smyth v. Ames*, 169 U.S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served.

Value has been defined as the ability to command the price. Railroad property is valuable as such only if, and so far as, used. If rates are too high, the traffic will not move. Hence, the value or rate-base is necessarily dependent, in the first place, upon the commercial ability of the property to command the rates which will yield a return in excess of operating expenses and taxes; and such value cannot be higher than the sum on which, with the available traffic, the fair return fixed under Section 15a can be earned. Persistent depression of rates or lessening volume of traffic, from whatever cause arising, ordinarily tends to lower actual values of railroad properties. It follows, that

since the Commission is required by the rule of *Smyth v. Ames* reaffirmed in the *Southwestern Bell* case, to determine the rate-base under Section 15a by actual value as distinguished from prudent investment, it must in making the finding consider the effect upon value of both the commercial and the legal limitations upon rates and, among other things, the effect of competition upon the volume of traffic.

Recent experience affords striking examples of commercial limitations upon rates. In *Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220*, the Commission sought to establish rates which would yield 6 per cent upon the aggregate values of the railroads in the several groups. . . .

On a large number of basic commodities, which were among the most important articles of commerce, the rates proved to be higher than the traffic would bear. Reductions became imperative. Within a year after the entry of that order, many applications for reductions were made to the Commission, not only by shippers but also by the carriers themselves. It was estimated that the reductions in freight rates made by the carriers prior to March 15, 1922, would aggregate for that year \$186,700,000; and would lower the general rate level nearly 5 per cent. On some important articles of traffic the entire increase made by *Ex parte 74* was cancelled. Further reductions were then ordered by *Reduced Rates, 1922, 68 I. C. C. 676*, the Commission saying (pp. 732-733) :

High rates do not necessarily mean high revenues, for, if the public cannot or will not ship in normal volume, less revenue may result than from lower rates. Shippers almost unanimously contend, and many representatives of the carriers agree, that "freight rates are too high and must come down." This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers "to provide the people of the United States with adequate transportation."

Further reductions made in the year 1923 are said to have again lowered freight rates 5 per cent. The effect of the several reductions made in the rates authorized by *Ex parte 74* is said to have lowered by \$800,000,000 the freight charges otherwise payable on the traffic carried during the eighteen months ending December 31, 1923. Each year since has witnessed a further lowering in the revenue per ton mile and per passenger mile.

This constant lowering of the weighted average of rates since 1920 must have been due to causes other than desire on the part of the Com-

mission. Its aim was to adjust rates so that they would yield the prescribed return. But for the period from 1920 to 1927 inclusive, there was only one year in which the railroads of the United States as a whole, despite general prosperity and greater efficiency, earned on the value found in Ex parte 74 brought down to date, the full average return prescribed as fair under Section 15a. The Commission repeatedly refused to permit carriers to make reductions, because the reduction would lower the revenues sought to be provided under Section 15a. On the other hand, carriers, although earning less than the fair return prescribed under Section 15a, have often voluntarily reduced rates. The lowering of rates was probably due in large measure to the influence of competing means of transportation.

Sixth. Since 1914, the railroads have been obliged, to an ever-increasing extent, to compete with water lines and with motors. This competition has been fostered by the government through the Panama Canal Act, through the intracoastal waterways acts, through the inland waterways acts, through the development of coastwise shipping by means of harbor improvements, and through Federal aid in the construction of highways. There has also been increased competition by pipe lines. Competition from other means of transportation has tended to arrest the normal increase in the volume of rail traffic; and as to some traffic it has actually produced a reduction in both the volume and the rates. It has resulted in a general shrinkage in the passenger business; in some regions, in a lessening of the carload freight; and in many, in a reduction of the volume of the less-than-carload freight. . . .

Moreover, rates which are not so high as to prevent commercially the movement of traffic are often required to be lowered because they conflict with some statutory provision. Thus, Congress compels reduction of rates which discriminate unjustly against individuals, localities, articles of traffic or other carriers. Perhaps the most striking instance of the limitation by law of rates which the traffic would bear commercially is furnished by cases under the long and short haul clause. By that clause, a rail carrier is often obliged (unless relieved by order of the Commission) to elect between suffering practically a total loss of existing traffic between competitive points or suffering a loss in existing revenues by reducing rates at both the competitive points and intermediate noncompetitive points. The effect of this limitation upon rates, and hence upon the actual value of railroads, has become very great. Its influence has grown steadily with the

growth of competition by water and motor, with the growth in the size of the individual railroad system, with the growth in the dependence of railroads for their revenues upon long-haul freight traffic and with the growing length of the average haul. It has become so important for rail carriers to hold a share of the long-haul freight traffic at competitive points, that the long and short haul clause, if not relieved from, results in the carriers' giving, in large measure, to the intermediate noncompetitive points, which otherwise would be subject to monopoly exactions, the full benefit of that lowering of rates required to meet the competition. The many applications for reductions made in petitions for relief from the operation of the long and short haul clause illustrate the influence of rail, as well as of water and motor, competition in thus depressing rates. Congress has by that clause limited values for rate-making purposes under Section 15a, almost as effectively as by its promotion of competitive means of transportation.

Seventh. In requiring that the value be ascertained for rate-making purposes, Congress imposed upon the rate-base, as defined in *Smyth v. Ames*, still another limitation which is far-reaching in its operation. By declaring in Section 15a that the Commission shall, "in the exercise of its power to prescribe just and reasonable rates" so adjust them that upon the value a fair return may be earned "under honest, efficient and economical management" Congress made efficiency of the plant an element or test of value. Efficiency and economy imply employment of the right instrument and material as well as their use in the right manner. To use a machine after a much better and more economical one has become available, is as inefficient as to use two men to operate an efficient machine, when the work could be performed equally well by one, at half the labor cost. Such an instrument of transportation, although originally well conceived and remunerative, should, like machines used in manufacturing, be scrapped when it becomes wasteful.

Independently of any statute, it is now recognized that, when in confiscation cases it is sought to prove actual value by evidence of reproduction cost, the evidence must be directed to the present cost of installing such a plant as would be required to supply the same service. For valuation of public utilities by reproduction cost implies that "the rates permitted should be high enough to allow a reasonable per cent of return on the money that would now be required to construct a plant capable of rendering the desired service"; and does not mean "that the plant should be valued at what would now be needed to duplicate the plant precisely." Proof of value by evidence of repro-

duction cost presupposes that a plant like that being valued would then be constructed. To the extent that a railroad employs instruments which are inconsistent with efficiency the plant would not be constructed; and because of the inefficient part, the railroad is obviously not then worth the cost of reconstructing the identical plant. While a part often has some service value, although not efficient according to the existing standard, its use may involve such heavy, unnecessary operating expense as to render it valueless for rate-making purposes under Section 15a. The Commission when requested to consider evidence of reproduction cost must, therefore, examine the value of every part of the plant, and that of the whole plant, as compared with the value of a modern, efficient plant. Upon such consideration the Commission may conclude that the railroad is so largely obsolete in construction and equipment as to render evidence of the reproduction cost of the identical plant of no probative force whatsoever. The duty so to deal with the evidence seems to flow necessarily from the rejection by the court of prudent investment as the measure of value and the adoption, instead, of the actual value of the property at the time of the rate hearing as the governing rule of substantive law.

The physical deterioration of a railroad plant through wear and tear may be very small as compared with a plant new, while its functional deterioration may be very large as compared with a modern efficient plant. This lessening of service value may be due to any one of several causes. It may, in the first place, be due to causes wholly external. Freight terminals, originally well conceived and wisely located in the heart of a city, may have become valueless for rate-making purposes under Section 15a, because through growth of the city the expense of operating therein has become so high, or the inescapable cost of eliminating grade crossings so large, that efficient management requires immediate abandonment of the terminals. And, even if the cost of continuing operation there is not so high as to require abandonment, the property may have for rate-making purposes a value far below its market value. Compare *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 186 U.S. 257, 268; *Wilcox v. Consolidated Gas Co.*, 212 U.S. 19, 52.

The lessening of the service value of a part of the railroad plant may flow from changes in the volume or character of its traffic. For economy and efficiency are obviously to be determined with reference to the business of the carrier then being done and about to be done. A station

warehouse for less-than-carload freight may have become valueless for rate-making purposes, because, through motor competition, the railroad had lost substantially all its less-than-carload business at that point. Large reductions in the value of passenger stations and equipment may have resulted from decline in the passenger traffic. Branch lines may lose all their service value so that they should be abandoned because motor transportation has become more efficient. On the other hand, the traffic may have grown so much as to render inefficient a part of a line originally wisely constructed with heavy grades or curves. In that event economy and efficiency will demand elimination of the grades and curves and may even require the building of tunnels or a cut-off. In so far as such a condition exists, the railroad would obviously not be reconstructed with the heavy grades and curves; and when considering the reconstruction cost of the whole property that part of the line must be given merely scrap value. Compare *Kansas City Southern Ry. Co. v. United States*, 231 U.S. 423.

Perhaps the most common cause of the lessening of service value of parts of railroad plants originally well conceived and still in good physical condition is the progress in the art of rail transportation. Science and invention have wrought since June 30, 1914, such extraordinary improvements in the types of automobiles and aëroplanes that no one would contend that the present service value of such machines should be ascertained by inquiring what their original cost was or what their reproduction cost would be. The progress since June 30, 1914, in the art of transportation by railroad has been less spectacular; but the art has been far from stagnant. In railroading, as in other fields of business, the great rise in the cost of labor and of supplies, and the need of better service, have stimulated not only inventions but also their utilization. Through technological advances instruments of transportation with largely increased efficiency and economy have been developed. The price of lower operating costs is the scrapping of those parts of the plant which progress in the art render obsolete. The present greatly increased efficiency of the railroads as compared with 1920, their greatly improved credit, and their present prosperity are, in large measure, due to the advances made toward introducing the improved instruments of rail transportation which have become available. Obviously much remains to be done.

The extent of this technological progress may be illustrated by the modern locomotive. The development of the superheater, the mechanical stoker, the booster, and other devices, the increase in the size

of the boiler, and other radical changes in size, weight, and design have resulted in the production of engines which are recognized by railway experts as having set such an entirely new standard of efficiency in fuel consumption, in tractive power, and in speed as to render wasteful, under many conditions, the use of older locomotives, no matter how good their condition. Statistics as to actual performances of the locomotive of today as compared with that built but a few years ago graphically illustrate this great advance in efficiency.

Its economies are compelling. But important changes in roadway and equipment are conditions of its effective use. Heavier locomotives make greater demands on the road structure which carry them. To obviate large maintenance expenses attendant upon frequent repair and replacement the roadway must be made more durable. To this end rails of heavier section and of increased length are adopted. Anti-creepers are freely used to prevent rail movement. Larger ties are selected; and they are treated to prevent deterioration. Ballast is made deeper and heavier, and of gravel or stone rather than of cinders. Bridges are of stronger construction. And to facilitate the movement of traffic, watering stations and automatic signals of improved design are introduced. Moreover, the effective employment of the modern locomotive involves ordinarily the use of larger cars of steel construction, displacing the wooden car of small capacity with which so many of the railroads were equipped in 1914. Engine terminals and car shops built prior to 1914 are, in many cases, inadequate for the efficient and economical handling, housing and repairing of the modern locomotives and cars, and must be replaced to prevent curtailment of the productive capacity of the rolling-stock by needless idle hours while awaiting service or repair. And the waste incident to the use of shop tools and machinery long since rendered obsolete by progress in the art must be stopped.

Thus, the efficient postwar railroad plant differs widely even from the efficient one of 1914. That during the recapture period here in question the plants of most of the railroads of the United States built before the war were lacking in improved instruments of transportation made available by recent progress in the art is of common knowledge. That this is true even today of many of the railroads will not be denied. To the extent that there is inefficiency in plant, there was and is functional depreciation, lessening actual value. That this functional depreciation, arising through external changes, through competitive means of transportation, and through progress in the art of transportation,

may, in respect to a particular railroad, have become so large as to more than counterbalance that increase in its actual value which would otherwise flow from the rise in the price level since 1914, seems clear.

It may be urged that the continued use of the inefficient plant and the repairing rather than replacement of its antiquated parts has been due to lack of capital and insufficient revenues. Such an excuse for failing to install the improved plant might have been conclusive if prudent investment had been accepted as the measure of value. But the fact that the management may have been wholly free from blame in continuing to use the inefficient parts obviously does not add to their actual value. The actual value of an existing plant, and the difference between its value and the present cost of constructing a modern efficient plant which will render the service, is precisely the same whether the continued use of the obsolete part was due to lack of capital, or to lack of good judgment, or to somnolence on the part of the management. As was said in *Board of Commissioners v. New York Telephone Co.*, 271 U.S. 23, 32: "Customers pay for the service, not for the property, used to render it." Only the then service value of the property is of legal significance under the rule of *Smyth v. Ames*.

It may also be urged that such functional depreciation of the railroad plant since 1914 is allowed for in the depreciation customarily estimated by the Commission. But this is not true. Functional depreciation prior to June 30, 1914, was included when valuing as of that date the then property of the railroads. But the instructions of the Commission provided that functional depreciation arising after that date should not be considered unless "imminent." And the Commission made clear that it did not intend by the term to include functional depreciation of the character described above arising from external causes, from the competition of new methods of transportation, from the extraordinary urban growth, from the need of new economies arising from the largely increased labor and fuel costs, and from other incidents of the war and postwar developments in industry and transportation. *Texas Midland R.R.*, 75 I. C. C. 1, 47-52, 124-130. Compare *Depreciation Charges on Steam Railroads*, 118 I. C. C. 285.

If weight is to be given to reproduction cost in making the valuation of any railroad for rate-making purposes under Section 19a and Section 15a, there must be a determination of the functional depreciation of the individual plant as compared with a modern, efficient plant adequate to perform the same service. To make such a determination for any railroad involves a detailed inquiry into the character and

condition of all those parts of the plant which may have reduced functional value because of the postwar changes affecting transportation above referred to and also into the character and the volume of the carrier's business. For the efficient plant means that plant which is economical and efficient for the particular carrier in view of the peculiar requirements and possibilities of its own business. To make such a determination justly, the Commission must have the data on which a competent and vigilant management would insist when required to pass upon the advisability of making capital expenditures. And the Commission would be obliged to give them the same careful consideration. The determination of the extent of functional depreciation is thus a very serious task; a task far more serious than that of determining merely physical depreciation.

To make such a determination of functional depreciation annually for each of the railroads of the United States would be a stupendous task, involving perhaps prohibitive expense. To make the necessary decisions promptly would seem impossible, among other reasons, because railroad valuation is but a small part of the many duties of the Commission. On the other hand, to adjust rates so as to render a fair return, and to provide through the recapture provision funds in aid of the weaker railroad, are tasks which Congress deemed urgent; and which must be promptly performed if its purpose is to be achieved. Obviously Congress intended that in making the necessary valuations under Section 15a a method should be pursued by which the task which is imposed upon the Commission could be performed. Compare *New England Divisions Case*, 261 U.S. 184, 197. Recognizing this, the Commission construed Section 15a as it had paragraph (f) of Section 19a. That is, as permitting the Commission to make a basic valuation as of some general date (June 30, 1914, was selected); and to find the value for any year thereafter by adding to or subtracting from the 1914 value the net increases or decreases in the investment in property devoted to transportation service as determined from the carrier's annual returns with due regard to the element of depreciation.

Eighth. The significance, in connection with current reproduction costs, of the requirement in Section 15a that value be ascertained "for rate-making purposes" as there defined becomes apparent when the position of railroads, in this respect, is compared with that of most local utilities enjoying a monopoly of a necessary of life. The fundamental question in the *Southwestern Bell case* was one of substantive constitutional law, namely: Is the rate-base on which the Constitution

guarantees to a public utility the right to earn a fair return the actual value of the property at the time of the rate hearing or is it the cost or capital prudently invested in the enterprise? The court decided that the rate-base is the actual value at the time of the rate hearing. That proposition of substantive law the Commission undertook to apply to the facts presented in the case at bar. Recognizing that evidence of increased reconstruction costs is admissible for the purpose of showing an actual value greater than the original cost or the prudent investment, it found in respect to some of the carrier's property that the evidence of enhanced reconstruction cost was persuasive of higher present value. As to the rest of the property, it held that the evidence was neither adequate nor persuasive.

Of both railroads and the local utility it is true, under the rule of substantive law adopted in the *Southwestern Bell* case, that value is the sum on which a fair return can be earned consistently with the laws of trade and legal enactments. But the operative scope upon railroads of the limitations so imposed upon the rates, and hence upon values, is much greater than in the case of local utilities. Rail rates are being constantly curbed by the competition of markets and of rival means of transportation. Rail rates are curbed also by the influence of high rates upon the desires of individuals. The public can, to a considerable extent, do without rail service. If the rates are excessive traffic falls off. Thus, when passenger rates are too high travel is either curtailed or people employ other means of transportation. But the service rendered by a local water company in a populous city is practically indispensable to every inhabitant. There can be no substitute for water and to escape taking the service is practically impossible; for an alternative means of supply is rarely available. Even the common business incentive of establishing low prices in order to induce an enlarged volume of sales is absent; since the volume of the business done by a water company will not be appreciably affected by a raising or lowering of the rates, except in so far as water in quantity is used for manufacturing purposes. In other words, the commercial limitation upon rates — what the traffic will bear — is to a large extent absent in the case of such a local monopoly. The city water user must submit to such rates as the utility chooses to impose, unless they are curbed by legislative enactment.

The legal limitations upon rates (so potent in the case of railroads) are, in the main, inoperative in the case of such a water company. Rail rates are sometimes held illegal because the exaction is greater than the

value of the service to the shipper. There is in fact no corresponding limitation upon water rates. The charge is so small, as compared with the inconvenience which would be suffered in doing without the service, that the worth to the water taker could rarely be doubted. The prohibition of discrimination against persons, places, or articles of commerce, which so frequently interferes to prevent railroads from charging higher rates, although the traffic would easily bear them, affords no protection to city water users; and seldom causes a loss of revenue to the water company. There is in respect to the water rates no prohibition comparable to that embodied in the long and short haul clause, which has an important effect in limiting rail rates. Hence, under the rule of substantive law declared in the *Southwestern Bell* case, practically the only limitation imposed upon water rates is the denial to the utility of rates which will yield an excessive return upon the actual value of the property. In applying that rule of substantive law, the then actual cost of reproducing the plant would (assuming it to be efficient) commonly be persuasive evidence of its actual value, as the current cost of reproducing the vessel was held to be in *Standard Oil Co. v. Southern Pacific Co.*, 268 U.S. 146, 156.

It is true that in the *Southwestern Bell* case the court passed also upon a subsidiary question — the weight and effect of the evidence of reconstruction cost. But the question of adjective law arose upon a record very different from that in the case at bar; and the action of the Commission here is entirely consistent with that decision. In the *Southwestern Bell* case direct testimony as to the then value of the property was introduced. The efficiency of the plant was unquestioned. Witnesses had testified both to the actual cost of constructing identical property at that time; and that the specific property under consideration was worth at least 25 per cent more than the estimate of the state commission. The court believed those witnesses. Concluding that this direct and uncontradicted evidence had been ignored by the state commission because of error as to the governing rule of substantive law, this court set aside the rate order as confiscatory, saying: "We think the proof shows that for the purposes of the present case the valuation should be at least \$25,000,000" (262 U.S. 276, 288).

The action of the Commission in the case at bar was consistent also with *McCardle v. Indianapolis Water Co.*, 272 U.S. 400, and *Bluefield Water Works Co. v. Public Service Commission*, 262 U.S. 679. Each of these water companies enjoyed a local monopoly of an indispensable

service. In order to provide a substitute, the community would have either to take the utility's property by eminent domain; or, if it was free to do so, build a competing plant. There was practically no commercial limitation upon the earning power of these water companies except the extent of the local market; and practically no legal limitation except the requirement that the rates charged should not be so high as to yield an excessive return upon the actual value of the utility's property. The current cost of constructing then a plant substantially like the utility's (assuming it to be efficient) would be persuasive evidence of its actual value. For upon that issue, concerning a local water monopoly, the inquiry would naturally be: How much would it cost the community to substitute for the private monopoly a publicly owned plant? But evidence of the cost of reconstructing a railroad built before 1914 might, for the reasons stated above, be no indication whatever of its postwar value for rate-making purposes under Section 15a. And where, as in the case at bar, the probative force of the evidence may be considered free from any question of confiscation, the rule declared in *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287, which requires in confiscation cases a judicial determination on the weight of the evidence, does not apply.

Ninth. A further question of construction requires consideration. It is suggested that, even if the Commission is not required to give effect to the higher price level when finding values for rate-making purposes under Section 15a, it must do so when fixing the amount of the excess income to be recaptured from a particular railroad under paragraphs 6 to 18. The language of the section affords a short answer to that contention.

The valuation prescribed in paragraph 4 is declared to be "for the purpose of this section" — that is, for recapture purposes as well as for rate making. And paragraph 6, which provides for the recapture, declares: "The value of such railway property shall be determined by the Commission in the manner provided in paragraph 4."

The recapture of excess earnings and the establishment of reserves are a part of the process of establishing such rates

that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management . . . , earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation (paragraph 2).

The recapture and reserve are the readjustment made necessary :

Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers who are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States (paragraph 5).

Thus, the direction in the order here challenged to pay or reserve the excess over 6 per cent of the amounts earned from 1920 to 1923 by rates established pursuant to Ex parte 74, Increased Rates, 1920, 58 I. C. C. 220, is merely a readjustment of those rates.

Tenth. The question remains whether the Commission, in valuing the structural property acquired before June 30, 1914, abused its discretion by declining to give effect to the evidence of enhanced reconstruction cost.

The O'Fallon insists that the Commission, in fact, adopted a mathematical formula ; that it declined to determine the present value of the carrier's property in accordance with "the flexible and rational rule of *Smyth v. Ames*, under which value is a matter of judgment to be determined by a consideration of all relevant facts and circumstances"; that it erected "an arbitrary standard of its own based on no relevant facts"; that if it had given consideration to all relevant facts and circumstances, including as one its cost of reproduction at current prices, "the value found must have been substantially higher"; and that its primary purpose was to determine the amount of the investment in the carriers' property. In short, the O'Fallon asserts that the Commission refused to find actual value; and, instead, found the prudent investment.

In support of this assertion, the O'Fallon points to the statement in the report that "the value of the property of railroads for rate-making purposes . . . approaches more nearly the reasonable and necessary investment in the property than the cost of reproducing it at a particular time" (p. 41). The statement just quoted does not mean that the Commission accepted prudent investment as a measure of value. It means merely that the Commission deemed the estimated original

cost a better indication of actual value than the estimated reconstruction cost. While this court declared in the *Southwestern Bell* case that prudent investment is not to be taken as the measure of value, it has never held that prudent investment may not be accepted as evidence of value, or that a finding of value is necessarily erroneous if it happens to be more nearly coincident with what may be supposed to have been the cost of the property than with its estimated reproduction cost. The single-sum values found by the Commission do not coincide either with the estimated prudent investment or with the estimated reconstruction cost. They are much nearer the estimated original cost of the property than they are to its estimated reproduction cost. But the values found do not conform to any formula.

The general method pursued by the Commission in reaching its conclusion closely resembles that approved by the court in *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U.S. 625, 629-630. It appeared that the O'Fallon Railroad had been constructed long prior to June 30, 1914. The Commission had before it "the cost of reproduction new of the structural portion of this property estimated on the basis of our 1914 unit prices, coupled with the knowledge that costs of reproduction so arrived at were not greatly different from the original costs." As bearing upon the value of those parts of the railroad's property which were added or replaced later the Commission had the actual cost. As bearing on the then value of the railroad land it had current values of adjacent lands. It had evidence concerning the railroad and the character and volume of its traffic, the working capital, revenues and expenses. It had evidence of increased price levels after 1914 and estimates of current reproduction costs during the recapture periods.

The carrier insisted that physically the property had appreciated more than it had depreciated; and urged the Commission to take as the basic measure of value the "cost of reproduction new at current prices to the exclusion of everything else, or at least of everything that might tend to a lower value" (124 I. C. C. 28). This the Commission declined to do. It gave full effect to increased current market values in determining the value of the land. It gave to the additions and betterments made after June 30, 1914, a value approximating their cost less physical depreciation. But, in respect to structural property and equipment acquired before June 30, 1914, it declined to give weight to the evidence introduced to show current reproduction costs greater than those of 1914. It concluded, despite the estimates of higher reconstruction costs, that, except for the additions, the actual value of this

part of the O'Fallon Railroad had not increased; and it found the single sum value for rate-making purposes in 1920 to be \$856,065; in 1921, \$875,360; in 1922, \$978,874; in 1923, \$978,246.

The Commission recognized, as stated in *Minnesota Rate Cases*, 230 U.S. 352, 434, that the determination of value is "not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts." *Georgia Ry. & Power Co. v. Railroad Commission*, 262 U.S. 625, 630. It states that "it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance and condition called to its attention on behalf of the carrier" as well as the evidence otherwise introduced; and that "from this accumulated information we have formed our judgment as to the fair basic single-sum values, not by the use of any formula but after consideration of all relevant facts."

The report makes clear that its finding was the result of an exercise of judgment upon all the evidence; that the Commission accorded to the evidence of reconstruction cost all the probative force to which it deemed that evidence entitled on the issue of actual value; and that it considered, as bearing upon value, not only the probable cost and the estimated reproduction cost, but also "descriptions of the carrier, of its traffic, of the territory in which it operates, its history, and summaries of the results of its operation" (p. 25).

The difficulties by which the Commission was confronted when requested to apply the evidence of reproduction cost can hardly be exaggerated. In the first place, the evidence was of such a character that it did not satisfactorily establish what would have been the current cost of reproduction during the recapture periods. During the years here in question there was practically no construction of new lines. Thus, the current cost of reproduction for those years had to be obtained by using index figures as the basis for a guess as to what it would cost to build then the identical railroad. To give to such figures effect as proving what it would then have cost to reproduce the O'Fallon Railroad, it must be assumed that there had not been introduced since June 30, 1914, new cost-saving methods of construction which would overcome, in whole or in part, the effect of the higher price level upon the cost of reproducing the identical property. This, in view of its experience, the Commission properly declined to do. In the second place there was a lack of evidence to show to what extent, if any, higher reconstruction cost, in the several recapture periods, implied a value higher than that theretofore prevailing. The Commission

believed that it could act only on proof; that it was not required or permitted to base findings on conjecture; and that to assign, under the circumstances, any weight to the evidence of reconstruction cost would be mere conjecture.

Moreover, the Commission had, through its valuation department, special knowledge of the property of this carrier. It had acquired necessarily in the performance of its many duties the general knowledge, already referred to, concerning changes in transportation conditions and of the advances in the art; and it knew how great was their effect upon the actual values of railroad property. The value of the O'Fallon Railway not having been finally ascertained under Section 19a, it was obliged by paragraph 4 to utilize "the results of its investigation under Section 19a of this act in so far as deemed by it available." The evidence introduced in the recapture proceedings showed, among other things, that of the five locomotives in the O'Fallon service, December 31, 1920, one had been built as early as 1874, and that their average age was 20.8 years; also that the aggregate outlays for additions and betterments in the railroad, less small retirements, had in 11 years been only \$98,148.25. The O'Fallon did not introduce any evidence bearing upon functional depreciation of the property. The Commission may reasonably have concluded that, even if there had been introduced persuasive evidence that the cost, during the recapture periods, of reproducing new the identical plant approximated the rise in the general price level, still the actual value of the O'Fallon Railway, as it existed June 30, 1914, had not increased, because the functional depreciation plus the physical depreciation since that date counterbalanced fully what otherwise might have been the higher value of the plant.

The O'Fallon urged that its large net earnings during the recapture periods and earlier fully established a higher value, independently of the evidence of reproduction cost. This contention ignores the peculiar character of the property. The railroad, which is owned by the Adolphus Busch estate and family and lies wholly in Illinois, operates about 9 miles of main line from two coal mines also owned by the Busch estate and family, to the tracks of the Terminal Company in East St. Louis. There are 12 miles of yardage tracks, located largely at the Busch mines. While the railroad is legally a common carrier, it is actually an industrial railroad. Ninety-nine per cent of its revenues are derived directly from the carriage of coal; and of the remaining 1 per cent, about half appears to come from a payment of \$300 a

month made by the Busch coal company for carrying its miners to and from its mines. Besides the coal from the Busch mines there is a substantial, but diminishing amount carried under a long-time contract, from two mines located on an electric road, the East St. Louis and Suburban Railway, which crosses the O'Fallon. This coal it carries from the junction to East St. Louis. See *St. Louis & O'Fallon Ry. Co. v. East St. Louis & Suburban Ry. Co.*, 81 I. C. C. 538. Obviously the value of this railroad property is wholly dependent upon the operation of the mines.

How long the four mines will continue to be operated was and still is entirely uncertain. Their product is subject to the competition of 221 other bituminous coal mines in Illinois. These, which are all located on other railroads, enjoy low rates to St. Louis. See *Perry Coal Co. v. Alton & Southern R.R.*, 5 Illinois Commerce Commission, 461.

The vicissitudes of coal mining, the diminishing use of coal since the war because of increased fuel efficiency, the competition of oil as fuel, and the growing use of hydro-electric power are matters of common knowledge; as are the diminishing operations during recent years of the Illinois coal mines as compared with the mines in non-union territory. Moreover, the decline in the volume of traffic, the reduction in coal rates made by Reduced Rates, 1922, 68 I. C. C. 676, and the growing expenses of the carrier due to increased pay roll, were put in evidence by it. In view of these facts, the Commission was clearly justified in refusing to find that the railroad had a higher value than in 1914, although the net earning as reported showed a return for the earlier period averaging $7\frac{1}{2}$ per cent upon the amount claimed as reproduction cost.

This court has no concern with the correctness of the Commission's reasoning on the evidence in making its findings of fact, since it applied the rules of substantive law prescribed by Congress and reached its findings of actual value by the exercise of its judgment upon all the evidence, including enhanced construction costs. *Virginian Ry. Co. v. United States*, 272 U.S. 658, 665-666; *Assigned Car Cases*, 274 U.S. 564, 580. We must bear in mind that here we are not dealing with a question of confiscation; that we are dealing, as was pointed out in *Smyth v. Ames*, 169 U.S. 466, 527, with a legislative question which can "be more easily determined by a commission composed of persons whose special skill, observation and experience qualifies them to so handle great problems of transportation as to do justice both to the

public and to those whose money has been used to construct and maintain highways for the convenience and benefit of the people."

MR. JUSTICE HOLMES and MR. JUSTICE STONE join in this opinion.

MR. JUSTICE STONE, dissenting:

I agree with what Mr. Justice Brandeis has said and add a word only by way of emphasis of those aspects of the case which appear to me sufficient, apart from all other considerations, to sustain the finding of the Commission.

The report of the Interstate Commerce Commission is rejected and its order set aside on the sole ground that in a recapture proceeding under Section 15a of the Interstate Commerce Act, it has failed to consider present reproduction cost or value of appellant's property and so to "give due consideration to all the elements of value recognized by the law of the land for rate-making purposes." No constitutional question is involved.

The Commission was called upon to value a railroad, with less than nine miles of main line track, which had been constructed prior to 1900. Much of its equipment was purchased before 1908, a considerable part being second-hand. Its traffic was very largely dependent on the output of a few coal mines which it served.

In performing its task the Commission had before it the cost of reproduction new of appellant's structural property, estimated on the basis of 1914 unit prices, "with the knowledge that the costs of reproduction so arrived at were not greatly different from the original costs." It had evidence of the actual cost of later additions and replacements, of the physical condition of the railroad and equipment, of the character, volume and sources of its traffic, of its working capital and revenues and expenses. It possessed, through its valuation department, special knowledge of the property of this carrier. Through its own experience it had the benefit of an expert knowledge of all the factors affecting value of railway property growing out of changes in methods of transportation, of improvement in transportation appliances and the consequent obsolescence of existing equipment, of improvement in methods of railroad construction and consequent reductions in cost. Although it had estimates of present construction costs in the form of index figures based on the comparative general price levels of labor and materials for 1914 and each of the recapture years, which it considered and discussed in its report, there was no evidence before it of the actual present cost of construction of this or any other railroad or any affirmative showing that, if appellant's road was to be built and

equipped anew, competent railroad engineers would deem the present structure and equipment suitable for or adaptable to the economical and efficient management contemplated by the statute.

After stating that it had before it the evidence above outlined, including that of reproduction cost, and such other matters as the carrier desired to bring to its attention, the Commission added, "From this accumulated information we have formed our judgment as to the fair basic single sum values, not by the use of any formula, but after consideration of all relevant facts." That the Commission gave consideration to present reproduction costs appears not only from its own statement, but from the fact that it gave full effect to increased current market values in determining the value of land and to additions and betterments since June 30, 1914, taken at their cost less depreciation. In the light of those considerations which affect the present value of appellant's structural property which Mr. Justice Brandeis has mentioned, I cannot say that the Commission did not have before it the requisite data for forming a trustworthy judgment of the value of appellant's road or that it failed to give to proof of reproduction cost all the weight to which it was entitled on its merits. Had the Commission not turned aside to point out in its report the economic fallacies of the use of reproduction cost as a standard of value for rate-making purposes, which it nevertheless considered and to some extent applied, I suppose it would not have occurred to anyone to question the validity of its order.

I cannot avoid the conclusion that in substance the objection, now upheld, to the order of the Commission is not that it failed to consider or give appropriate weight to evidence of present reproduction cost of appellant's road, but that it attached less weight to present construction costs than to other factors before it affecting adversely the present value of the structural property. That this was the real nature of the objection voiced by the dissenting Commissioners seems to me apparent from their opinion. They seem to assume that as a result of *Southwestern Tel. Co. v. Public Service Comm.*, 262 U.S. 276, and other cases in this court, the Commission as a matter of law may never, under any circumstances, find that the value of the structural part of a railroad does not exceed its fair value of an earlier date, if the Commission has before it evidence of later increased construction costs. They say "under the law of the land," in valuing a railroad under Section 15a "we must accord weight in the legal sense to the greatly enhanced cost of material, labor and supplies" during the recapture periods.

Weight in the legal sense is evidently taken to be not that accorded by an informed judgment but imposed by some positive rule of law.

Without discussion of the evidence and other data which received the consideration of the Commission, the opinion of this court seems to proceed on the broad assumption that the evidence relied on, mere synthetic estimates of costs of reproduction, must so certainly and necessarily outweigh all other considerations affecting values as to require the order of the Commission to be set aside. In effect the Commission is required to give to such index figures an evidential value to which it points out they are not entitled when applied to railroad properties in general or to this one in particular, and this, so far as appears, without investigation of the soundness of the reasons of the Commission for rejecting them.

This court has said that present reproduction costs must be considered in ascertaining value for rate-making purposes. But it has not said that such evidence, when fairly considered, may not be outweighed by other considerations affecting value, or that any evidence of present reproduction costs, when compared with all the other factors affecting value, must be given a weight to which it is not entitled in the judgment of the tribunal "informed by experience" and "appointed by law" to deal with the very problem now presented. *Illinois Central, &c. R.R. v. Interstate Commerce Commission*, 206 U.S. 441, 454. But if "weight in the legal sense" must be given to evidence of present construction costs, by the judgment now given we do not lay down any legal rule which will inform the Commission how much weight, short of its full effect, to the exclusion of all other considerations, is to be given to the evidence of synthetic costs of construction in valuing a railroad property. If full effect were to be given to it in all cases, then, as the Commission points out in its report, the railroads of the country, valued by the Commission in 1920 at nineteen billion dollars, would have had in that year a reproduction value of forty billion dollars and we would arrive at the economic paradox that the present value of the railroads may be far in excess of any amount on which they could earn a return. If less than full effect may be given, it is difficult for me to see how, without departure from established principles, the Commission could be asked to do more than it has already done — to weigh the evidence guided by all the proper considerations — or how, if there is evidence upon which its findings may rest, we can substitute our judgment for that of the Commission. Such, I believe, is the "due consideration" which the statute requires

of "all the elements of value recognized by the law of the land for rate-making purposes."

As I cannot say *a priori* that increased construction costs may not be more than offset by other elements affecting adversely the present value of appellant's property, and as there was evidence before the Commission to support its findings, I can only conclude that the judgment below should be affirmed. In any case, in view of the statement of the Commission that it considered all relevant facts, including the elements of value brought to its attention by the carrier, I should not have supposed that we could rightly set aside the present order without some consideration of the probative value of the evidence of present reproduction costs which the Commission discussed at length in its report.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in this opinion.

QUESTIONS

1. Has the Commission any instructions applying to its valuations for rate-making purposes that are different from those applying to its general valuations? What, if any, is the effect of such instructions?

2. Assume that the Commission believes the decisions of the courts relating to value to be unsound from the economic point of view. What shall be its action?

3. "Probable results of a particular public policy are quite as important as familiarity with the law books." Comment on this statement. What did the Supreme Court think of it in the O'Fallon case?

4. Do investors in unregulated industries suffer loss with the depreciation of the dollar? Should those in regulated industries be given different treatment?

5. What are the different theories of valuation that might be used? Explain how each would affect the level of rates.

6. What is the difference between a rate of return resting on prudent investment value and one based on investment value? Which is economically the more sound? Would the Supreme Court approve a valuation based on either principle?

7. What rule of value was set forth in *Smyth v. Ames*?

8. What did *Southwestern Bell Telephone Co. v. Public Service Commission* add to the *Smyth v. Ames* rule?

9. How does Justice Brandeis reconcile his dissent in the O'Fallon case with the *Southwestern Bell*, the *Indianapolis Water*, and the *Bluefields* decisions?

182 GOVERNMENT AND RAILROAD TRANSPORTATION

10. "The Supreme Court has, in the O'Fallon case, . . . gone far to make public ownership of railroads the only logical course in the future." Is there any basis for such a conclusion?

11. On the day following the O'Fallon decision President Hoover was quoted as having said, "I am confident that there will be no increase in railway rates as the result of the O'Fallon decision." What basis may he have had for such a statement?

12. "The Supreme Court did not object to the result of the Commission's decision in the O'Fallon case. It objected to the method by which it reached that result and, particularly, to the way in which it stated the result." Is this statement correct?

13. Outline the method which the court indicated that the Commission should follow in setting valuations for rate-making purposes.

14. To what extent has the Supreme Court's decision in the O'Fallon case clarified the problem of valuation?

15. It has been stated that the O'Fallon case ranks with the 1895 income-tax case and the 1911 Standard Oil case as one of the three most momentous economic decisions of the past seventy years. Has such a statement any basis in fact?

16. What advantages does the O'Fallon decision give to the railroads? Does it affect all of them alike?

17. Assume that a great fall in the price level occurs from 1935 to 1940. Under such a condition what might be the attitude of the railroads to the theory of value adopted in the O'Fallon decision?

18. Outline a method of railroad valuation which would be acceptable from the economic point of view. Would the Supreme Court, as it is made up at present, uphold the method outlined? What remedy exists if the court fails to uphold it?

19. Would the court be satisfied if, in a valuation case, the Commission recited that it had given due consideration to reproduction costs, or must the Commission make clear how and to what extent it has given consideration to that element of value?

2. ISSUE OF NEW SECURITIES

[A]

[The pertinent statutory provisions are found in Section 20a of the Interstate Commerce Act (I. C. Act, pp. 69-73).]

[B]

Application of the Delaware, Lackawanna & Western
Railroad Company for Authority to issue Capital Stock
and to distribute it as a Dividend

Interstate Commerce Commission (1921), 67 I. C. C. 426

Report of the Commission

BY THE COMMISSION :

The Delaware, Lackawanna & Western Railroad Company, a common carrier by railroad subject to the Interstate Commerce Act, seeks authority under Section 20a of that act, conditioned upon its disposal of its coal properties and acceptance of certain provisions of the Pennsylvania constitution, to issue capital stock of an aggregate par value equal to the full amount of its corporate surplus, or such part thereof as we may approve, and to distribute such stock pro rata among its stockholders as a dividend. The application was made under oath, signed and filed on behalf of the applicant by one of its executive officers, and notice thereof was given to, and a copy thereof filed with, the governor of each state in which applicant operates. No objection to the granting of the application was made by any state authority.

The applicant operates about 960 miles of steam railroad radiating from the anthracite coal fields of Lackawanna and Luzerne counties, Pennsylvania. Its main line extends from Hoboken, New Jersey, through these fields to Buffalo, New York, with numerous branches. Its system, including second, third, fourth, and switch tracks, has approximately 2700 miles of track, of which about 30 per cent is owned and about 70 per cent leased or controlled. The owned lines are in Pennsylvania and the leased or controlled lines chiefly in New York and New Jersey. It owns 742 locomotives, 28,914 freight cars, and 929 passenger cars.

The applicant is a Pennsylvania corporation, which had its genesis in the Liggetts Gap Railroad Company, organized by special act in 1832, to build and operate a railroad from what is now Scranton, Pennsylvania, northward to the New York state line. The original charter contemplated a toll road open to the public for hauling by wagons and other conveyances. A later act permitted it to furnish "the exclusive motive power," and it eventually gained authority to acquire and operate other railroads, within or without Pennsylvania, to acquire and hold coal lands, and to mine, purchase, and sell coal.

The laws of New York authorized it to acquire and operate railroads in that state and to hold lands therein for office and terminal purposes; and it has analogous power from New Jersey. The present corporate name was adopted in 1851. . . .

Since its organization the applicant has operated in the dual capacity of mining company and carrier, though the sales end of its coal business was segregated in 1909 following the decision of the Supreme Court of the United States in *United States v. Reading Co.*, 226 U.S. 324; 228 U.S. 158. See also *United States v. Del., Lack. & West. R.R.*, 238 U.S. 516, and *D., L. & W. Coal Co. v. D., L. & W. R.R. Co.*, 49 I. C. C. 203. Early development was confined largely to the extension of facilities to broaden the coal market, and applicant states that prior to 1900 it was not properly equipped to handle any freight other than coal. In that year comprehensive improvements were begun to modernize the road and bring it to a high state of efficiency. These included reconstruction of thirty miles of line north of Scranton, and the building of the "Jersey cut-off" from Portland, Pennsylvania, to Hopatcong, New Jersey, at a cost of over \$400,000 per mile. Very large sums have been spent during the last twenty years in carrying out this program of rehabilitation.

The applicant has \$42,220,550 par value of stock in the hands of the public and \$102,600 of bonds. Its leased lines, most of which, according to its statement, are leased in perpetuity, have \$44,222,600 of stock and \$53,697,657 of bonds in the hands of the public, a total of \$97,920,257, upon which it in effect pays rentals of \$5,079,725 yearly. The annual interest on its own funded debt is \$6156. Its situation, therefore, is in a sense equivalent to that of a road having outstanding \$42,220,550 of stock and \$98,022,875 of funded debt, upon which it pays yearly interest of \$5,085,681, or about 5.15 per cent, with a total capitalization aggregating about \$150,000 per mile of road and \$52,100 per mile of track. . . .

The applicant distributed cash dividends of about 72 per cent upon its stock in 1909, of 22½ per cent in 1917, and of 20 per cent in every other year from 1905 to 1919, inclusive. The total dividends from 1853 to and including May 31, 1919, are given as \$210,159,430.64, of which nearly \$23,000,000 was in stock of the applicant or of its subsidiaries and the remainder in cash. The average rate of dividends during this period was about 12.8 per cent.

Since 1853, according to one of its exhibits, the applicant's net income from transportation has been \$208,004,765.04, that from sale of

coal \$66,009,776.02, that from other sources \$40,840,137.99, and its total net income \$314,854,679.05. From this the exhibit shows payment of \$210,159,430.64 in dividends and \$14,233,472.38 in interest, leaving a book surplus of \$90,461,776.03. The dividends exceeded the net income from transportation by \$2,154,665.60, but net income from that source and sources other than sales of coal exceeded dividends by \$38,685,472.39.

The applicant states that these surplus earnings are represented by the following items :

Investments in railroad property	\$32,050,645.47
Other investments :	
In mining properties	\$2,205,988.00
In other nonoperating properties	2,344,179.51
In railroad, etc., stocks and bonds	24,824,046.25
In other stocks, bonds, etc.	14,229,585.67
In advances to leased roads, etc.	10,344,048.64
Current assets (excess over current liabilities)	3,136,714.80
Net accounts, United States Railroad Administration	<u>1,326,567.69</u>
Total surplus	<u>\$90,461,776.03</u>

This result is obtained by deducting from the book investment in road and equipment, less reserve for depreciation, the aggregate outstanding stock and funded debt, and assuming that the remainder and the other assets listed were paid for out of surplus earnings.

The applicant contends that its actual surplus is much larger, since its coal properties are carried in these figures at their remaining original cost rather than their value, and since expenditures for additions and betterments were frequently charged to operating expenses prior to 1907.

In its 1919 annual report to us the applicant's total corporate surplus is given as \$192,112,826.02. The discrepancy between this amount and the \$90,461,776.03 shown above is due to the fact that in 1913 and 1917 the book value of the coal properties was increased approximately \$100,000,000. It seems that these properties originally cost \$17,474,256.06 and that this amount has been reduced by credits for surface sales and royalties, and charge-offs for depreciation and depletion, to the \$2,205,988 remaining original cost included above. These lands, however, contain more than 400,000,000 tons of unmined coal, and the applicant, to secure the benefit of the depletion rate in its income tax return, estimating a minimum value of not less than 25 cents per ton, increased its book value as stated and entered a corresponding liability in the appropriated surplus account. . . .

Section 20a of the Interstate Commerce Act makes it unlawful for any carrier to issue stock or other securities unless by order we

authorize such issue, and provides that we shall make such order only if we find that the issue (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service and (b) is reasonably necessary and appropriate for such purpose.

Authority to issue stock cannot be claimed as a right. It is within our discretion, subject to the limitation that we shall grant authority only if we are able to make the necessary finding. If the applicant is lawfully entitled to earn a return upon the fair value of property acquired out of surplus this right will persist whether or not the stock issue is permitted.

Assuming that the issue is for a lawful object, is that object "compatible with the public interest" and one "which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service"?

The applicant contends that we should permit the capitalization of the full surplus of the company. It argues that refusal to grant the application would seriously discourage, if not entirely prevent, investment by the public in railway stocks. Some inducement, it says, must be offered investors in stock, to make up for the security and certainty both as to principal and interest afforded by mortgage bonds, and therefore that there must be a chance of more attractive return in the case of stock. It alleges that a refusal to grant this application would be public notice of a lack of advantage in investing in stock. And it suggests that in the event of denial of the application there would be no inducement in the future to use surplus earnings for additions and betterments, and that stockholders would insist each year upon the distribution of all available earnings.

The applicant points out that the lawful declaration of dividends at a rate high in comparison with that of other railroads in the same territory has led the public to the unwarranted conclusion that it has received and is receiving an excessive return on its investment in property devoted to public use, and that the proposed increase in stock would tend to remove this source of distrust and suspicion. It suggests also that in case of consolidations with other lines the applicant could secure much better terms if its capital stock more nearly represented its value than as at present. Our attention is called to

paragraph 6 of Section 5 of the Interstate Commerce Act, which provides that in the event of consolidation of railroad companies the capitalization of the resulting company "shall not exceed the value of the consolidated properties as determined by the Commission," and it is urged that in view of this provision we should, in our control of securities, endeavor to adjust the capital of carriers to the value of their properties.

There is no proof that the surplus sought to be capitalized is the result of excessive transportation charges. Traffic has been carried by the applicant at rates, controlled by state or interstate regulatory bodies, substantially the same as those applicable over competing lines. And there is no showing that the return from transportation charges upon the fair value of the property owned or used for common-carrier purposes has been excessive. Clearly the amount of the return from the coal property is immaterial except as it tends to explain what might otherwise appear to be excessive carrier return.

The question of the reasonableness of the applicant's past return is not in fact before us at this time. Where the public has found it expedient to adopt a *laissez-faire* policy to encourage utility development, it cannot be said, in the absence of regulation, that profits have been illegally collected. The title to the surplus has vested without limitation or condition in the corporation, and benefits the shareholder. The doctrine of implied trust, sometimes applied to donated property by courts and commissions, has no application to excessive return, for the payment of rates carries with it no requirement that the funds be left in the business or used for the public benefit. Its strained application to carriers which have made additions and betterments from surplus would only penalize those who came nearest to benefiting the public. The surplus from income, in such cases, is unrestricted legal property of the company, and ceases to be funds of the public, before the decision to divert it to either dividends or additions and betterments is made.

Such reasoning, however, does not warrant authorization of the issuance of securities merely upon a showing of invested earnings.

To render the proposed issuance "compatible with the public interest," within the meaning of the statute, we are convinced that a substantial surplus should remain uncanceled as a support for the applicant's credit, providing for emergency needs, offsetting obsolescence and necessary investments in nonrevenue-producing property, and serving as a general financial balance-wheel.

We do not share the applicant's apprehension as to the effects which will follow the required maintenance of such a surplus. Such a reserve is a direct benefit to the stockholder. It maintains the market value of his stock and protects not only his dividends but his pro-rata share of the assets available on dissolution.

The terms of possible future consolidations and mergers are not now before us and can be dealt with when the occasion arises.

The applicant claims a total surplus available for capitalization of \$90,461,776.03. In view of the proposed sale of its mining property and distribution of the proceeds, the \$2,205,988 shown as surplus invested in such properties may be dismissed from further consideration.

Several items of the remaining \$88,255,788.03 of the surplus do not fall within that class of assets which we deem it proper to permit the applicant to capitalize. On May 31, 1920, it held in its treasury stocks of railroad, terminal, transfer, and ferry companies to the amount of \$9,151,048.75, and bonds of such companies to the amount of \$15,672,997.50, making a total of \$24,824,046.25. Of this amount, \$56,450 was applicant's own stock. The balance consisted mainly of stocks and bonds of lines leased by the applicant. The record discloses no intercorporate relations or other circumstances which bring these holdings within the sphere of securities which could properly be capitalized by a common carrier. It is not necessary for the applicant to hold securities of its leased lines in order to operate its system if, as it states, its leases are in perpetuity. We are unable to form any sound opinion on the record before us as to lines controlled by stock-ownership. Neither the actual value nor the earning power of the securities is shown. So far as the record shows all of these securities are in the same class with the recognized shifting assets. The applicant on that date also held in its treasury stocks of advertising, mining, timber, and land companies to the amount of \$1,662,813.37, and United States government bonds and certificates of indebtedness, municipal bonds, and steel company bonds to the amount of \$12,566,772.30, making a total of \$14,229,585.67. These are flexible assets which we deem it improper to permit applicant to capitalize. If it should be thought desirable to distribute the portion of surplus invested in such securities among the stockholders, the applicant would be able to apportion the securities themselves or distribute the proceeds thereof. They are neither property used or useful in rendering the public service, nor an assured part of any surplus.

Nor is any reason manifest why the applicant should be permitted

to issue capital stock against its net account of \$1,326,567.69 with the United States Railroad Administration, which is merely an unadjusted balance.

The record contains no showing which would justify our authorizing the applicant to capitalize its investments in nonoperating properties. The reasons for acquiring and holding these properties are not stated, and no present or contemplated future use of them in connection with the applicant's transportation service is shown.

Applicant claims that on May 31, 1920, \$32,050,645.47 of its surplus was invested in railroad property. . . .

The applicant's lines are stated to have been entirely rebuilt since 1900, the work, with the exception of the construction of the Lackawanna Railroad of New Jersey and the cut-off line in Pennsylvania, being accomplished solely by the use of the applicant's earnings. The testimony is that no charge was made to the capital account in connection with the excess cost of replacements prior to 1914 because no depreciation reserve had been set up, and these expenditures were considered as offsetting depreciation. No comparison of these items is made of record, and the policy as to writing off abandoned property other than equipment is not shown.

The applicant is not seeking to capitalize any equity in its leases of railroad property, but only the amount of earnings said to have been invested by it in the properties of such roads. The evidence is that most of these roads are leased in perpetuity, but that some are leased for the corporate life of the subsidiary line. Without the leases before us we are unable to determine the length or nature of the applicant's tenure, and cannot on the present record authorize it to capitalize its total investment in such property.

The applicant has advanced from its earnings \$10,344,048.64 to leased and controlled lines. These advances are carried into the capital accounts of such roads and credited by them to the applicant. They differ little from investments in leased lines, and when shown upon the applicant's books as such investments may be capitalized by it.

The applicant seeks to capitalize \$3,136,714.80, the excess of its current assets over its current liabilities as working capital necessary in the operation of the road. The record indicates that there are included in its current assets mining materials and supplies valued at \$1,364,618.19 which doubtless would be turned over to the purchaser of its coal properties and therefore should not be considered in passing upon this application.

The evidence establishes (1) that the Delaware, Lackawanna & Western Railroad has a large uncanceled surplus; (2) that the present capitalization is below the actual investment or fair value of the property; (3) that the increase in capitalization which would follow the grant of authority hereinafter suggested would still leave the total capitalization of the applicant below the fair value of the property; and (4) that the remaining uncanceled surplus will be sufficient to serve the purposes for which a surplus should be accumulated.

We find that the proposed issue of capital stock by the Delaware, Lackawanna & Western Railroad Company as a dividend has been justified to the extent of \$45,000,000 and that to that extent it (a) is for a lawful object within its corporate purpose and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service; and (b) is reasonably necessary and appropriate for such purpose; but that the applicant has not justified an authorization of the issuance as dividends of the remainder of its proposed capital stock and that authority therefor should be denied.

We further find that the authorization of the issue of \$45,000,000 capital stock as above provided should be conditioned upon the issue of evidences of indebtedness by the leased lines to applicant for the \$10,344,048.64 carried on its books as advances to leased lines, and the transfer by the Delaware, Lackawanna & Western Railroad Company of that sum to the proper subsidiary account under investment in leased lines.

An appropriate order will be entered.

[C]

Western Maryland Equipment Trust, Series D

Interstate Commerce Commission (1926), 111 I. C. C. 434

Division 4, Commissioners Meyer, Eastman, and Woodlock

BY DIVISION 4:

The Western Maryland Railway Company, a common carrier by railroad engaged in interstate commerce, has duly applied for authority under Section 20a of the Interstate Commerce Act to assume obligation and liability in respect of \$2,500,000 of Western Maryland Railway equipment-trust certificates, series D, by entering into an

equipment-trust agreement under which the certificates will be issued and into a lease of certain equipment to be purchased. No objection to the granting of the application has been presented to us.

In December, 1925, the applicant wrote out of its investment in equipment \$1,620,022.64, representing the aggregate book value of 1905 steel-underframe gondola cars which had been retired because they were unfit for service. It has sold to the Dickson Construction & Repair Company the usable material in each of such cars at \$590 a car, or a total of \$1,123,950.

The applicant represents that its supply of box cars is inadequate, and to meet its needs for that class of cars has arranged to have the Dickson Construction & Repair Company build for it, utilizing the usable materials purchased as aforesaid, 1800 40-foot 40-ton steel-underframe box cars. The new cars are to cost \$1890 each, or a total of \$3,402,000.

Andrew S. Hannum and Granville H. Davis will purchase the rebuilt cars from the builders, and, as vendors, enter into an agreement with the Bank of North America & Trust Company, of Philadelphia, Pennsylvania, and the applicant, creating the Western Maryland Railway equipment trust, series D, and will sell and deliver the equipment to the trustee, who will lease it to the applicant.

Upon delivery to the trustee of any of the equipment it will issue to the vendors, or upon their order, for distribution to the subscribers to the equipment trust, Western Maryland Railway equipment-trust certificates, series D, in the amount of \$1,388.88 for each car delivered, but not exceeding \$2,500,000 in the aggregate, or the trustee may, at the request of the vendors, deliver the certificates to them, or upon their order, upon deposit with the trustee of a sum in cash equal to the principal of the certificates so requested to be delivered. From the sum thus deposited and the installments of rent payable under the terms of the lease, the trustee will pay the cost of the trust equipment.

The trust agreement will be dated May 15, 1926, and will provide for the issue by the Bank of North America & Trust Company of certificates evidencing shares in the equipment trust. The certificates are to be in the denomination of \$1000, payable to bearer or registered as to principal. They will mature in amounts of \$100,000 at successive semiannual intervals beginning November 15, 1926, and ending November 15, 1938, and they will have dividend warrants attached entitling the holders to dividends from May 15, 1926, at the rate of 5 per cent per annum, payable semiannually on November 15 and May 15 in each year. By the terms of the trust agreement, the

applicant will indorse on each of the trust certificates, substantially in the form given in the agreement, its unconditional warranty of the payment of the principal and dividends when the same become payable.

The lease of the equipment between the Bank of North America & Trust Company and the applicant will be dated May 15, 1926, and will provide that the lessee shall pay to the lessor (*a*) an amount in cash, equal to the difference between the cost of the trust equipment and the principal amount of certificates issuable in respect thereof, (*b*) necessary and reasonable expenses of the trust and lease, (*c*) any and all taxes upon the income or property of the trust, (*d*) the dividend warrants when the same become payable, and (*e*) \$100,000 at successive semiannual intervals beginning November 15, 1926, and ending November 15, 1938. Title to the trust equipment will remain in the trustee until the payments provided for in the lease have been made, whereupon it will be transferred to the applicant or its nominee or nominees.

The applicant notified various bankers of its desire to sell these certificates, inviting tenders therefor, and eight bids were received from bankers located in New York City and Baltimore, Maryland. They were sold to Kean, Taylor & Company and Roosevelt & Son, of New York City, and Brinkman & Company, Incorporated, of Baltimore, Maryland, the highest bidders, at 100.886 per cent of par and accrued dividends. On that basis the average annual cost to the applicant will be approximately 4.833 per cent. The action of the applicant in resorting to this method for the sale of the certificates is commendable.

Recent experience in connection with the sale of equipment-trust certificates leads us to believe that conditions in the investment market are, and for at least some time to come are likely to be, such that railroad companies raising capital in this way may now profitably adopt a policy of offering such securities to public competitive bidding after the manner in which state, county, and municipal securities are commonly sold. The reasons which lead us to this belief may be summarized as follows:

1. These securities are of virtually uniform character, they enjoy a high degree of safety as to payment of principal and interest, and the prices that they bring are very largely determined by interest rates current for the best class of security. The relative financial strength of the issuing carriers has ceased to be an important factor in determination of price.

2. While it is probably true that in former days equipment-trust securities were largely taken by investment institutions, such as insurance companies, savings banks, etc., it is evident that they are now growing in favor with individual investors who have at times, of late, been willing to pay more for them than these institutions.

3. The investment market as a whole has grown very greatly in size in the years following the war. It now absorbs annually some billions of securities other than those of railroads. While it is true that industries other than railroads have taken and are taking by far the largest part of the new capital, it is also true that there is an ever-growing demand for securities of the best class, in which railroad equipment trusts occupy a prominent place. It seems to us that the sale of these by public competitive bidding will tend to widen their market and thus produce capital more cheaply for the issuing railroads.

It is because of this probable result that we favor such a method of sale at this time. We propose for the present no change of selling methods in the case of other railroad securities and are fully mindful of the considerations so frequently and forcefully urged in favor of the ordinarily existing relation of banker and railroad, and of the advantages to the latter which many believe result from a proper conduct of that relation by both parties thereto. We are concerned with the sale and distribution of railroad securities from the point of view of economy in the cost of capital to the railroads, to the end that the total burden of transportation shall be no larger than is absolutely necessary. It is our opinion, however, that the sale of equipment-trust certificates by public competitive bidding will be effective in so widening the market for these securities as to assist in the effective and economic financing of railroads by means of other securities such as may from time to time become necessary. Whether in the course of time it may come about that classes of railroad securities other than equipment trusts shall be susceptible of the same method of sale with economical results is a question that need not now be considered.

By our order in Regulations Relative to Bids of Carriers, 56 I. C. C. 847, we issued regulations as to transactions under the Clayton Anti-trust Act. A number of sales of securities have been effected under the procedure therein prescribed. It is thought that the procedure under these regulations may well be followed also in the disposition of equipment-trust certificates.

It appears that the total cost of the usable materials to be utilized in the building of the box cars amounts to \$1,123,950. Deducting

from the aggregate purchase price of \$3,402,000 for such cars, the cost of the usable materials, leaves \$2,278,050 as representing the new material and labor involved in their construction. We will therefore authorize the assumption of obligation and liability in respect of \$2,278,000 of certificates.

We find that the proposed assumption of obligation and liability by the applicant as aforesaid in respect of \$2,278,000 of certificates (a) is for a lawful object within its corporate purposes, and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

An appropriate order will be entered.

QUESTIONS

1. How does the issue of new securities by railroads affect the general public? the holders of old securities of the railroad concerned? the finances of the railroad?

2. With what conditions must a railroad comply before it can issue new securities?

3. What will the Interstate Commerce Commission consider before making its decision as to the issue of securities?

4. Are bonds issued without the Commission's consent valid if the issuing railroad is engaged in intrastate commerce? in interstate commerce?

5. In the case quoted under *B*, p. 183, what justification had the railroad for requesting permission to issue new capital stock?

6. Does the issuance of new stock mean that the railroad will have to raise its rates to pay dividends on its new capitalization?

7. What advantage can come to the Delaware, Lackawanna & Western Railroad from the issue of new stock?

8. Is the Commission's decision, that equipment-trust securities should be sold to the highest bidder, in accord with sound business policy?

9. In 1926 a railroad stockholder protested against an issue of bonds by the railroad. He contended that the bonds should be sold to the highest bidder instead of to the road's banker. Did the Commission so order?

10. What are the major abuses that Section 20a of the Interstate Commerce Act is designed to remove?

11. Why was the power of the Commission not extended to the regulation of the issue of short-term notes?

G. UNJUST DISCRIMINATION FORBIDDEN

1. ACTS PROHIBITED

[The pertinent statutory provisions are found in the Interstate Commerce Act, Sections 2 and 3, paragraphs 1-3 (I. C. Act, pp. 14-15). The sections originally appeared in the act of 1887. Additions which appeared in the Transportation Act of 1920 include the reference to the transmission of intelligence in Section 2 and all of the second paragraph of Section 3.]

a. DISCRIMINATION IN CHARGES TO PERSONS FOR LIKE SERVICE

Wight *v.* United States

United States Supreme Court (1897), 167 U.S. 512

Statement by MR. JUSTICE BREWER: . . .

On October 8, 1894, an indictment was found in the district court of the United States for the western district of Pennsylvania, charging the defendant with a violation of said Section 2 [of the Interstate Commerce Act]. The trial resulted in a verdict and judgment against him, to reverse which this writ of error was sued out.

In their brief his counsel make this statement of facts:

The undisputed facts proved in evidence are as follows: F. H. Bruening was engaged, during the year 1892, in the business of a wholesale dealer in beer in the city of Pittsburg; he purchased his beer in Cincinnati in carload lots, from the Moerlein Brewing Company of that city; Bruening's place of business was situated on the track of the Pittsburg, Cincinnati & St. Louis Railroad Company, known as the "Pan-handle," and had a siding connection with that road, so that Mr. Bruening could ship his beer from Cincinnati over the Pan-handle Railroad, and have it delivered and unloaded directly into his warehouse. The rate by the Pan-handle Railroad for this service from Cincinnati to the warehouse was 15 cents per 100 pounds. The station of the Baltimore & Ohio Railroad Company in Pittsburg was at some distance from Bruening's warehouse, and there was no track connection between the Baltimore & Ohio Railroad and the warehouse, so that if Bruening shipped his beer from Cincinnati by the Baltimore & Ohio route it was necessary to haul it in wagons from the Baltimore & Ohio station to the warehouse. The rate charged by the Baltimore & Ohio route between Cincinnati and Pittsburg, on beer in carloads, was likewise 15 cents per 100 pounds.

In the month of June, 1892, agents of the Baltimore & Ohio Railroad Company, subordinate to the plaintiff in error, made an arrangement with

Mr. Bruening, by which it was agreed that, if Bruening would ship his beer via the Baltimore & Ohio route from Cincinnati to Pittsburg, the railroad company would make the same delivery at the door of his warehouse that was made by the Pan-handle Railroad; that is to say, the railroad company would haul the beer from its station to Bruening's warehouse without extra charge. When, afterwards, it was found that the cost to the railroad company for this hauling would be $3\frac{1}{2}$ cents per 100 pounds, Bruening offered to do the hauling himself for that price, and his offer was accepted. This arrangement was reported to the plaintiff in error by his subordinates, approved by him, and continued in effect during the months of June, July, August, and September, 1892. During these months Bruening made large shipments of beer in carloads via the Baltimore & Ohio route, paid the charge of 15 cents per 100 pounds on delivery, hauled the beer from the station to his warehouse, and at the end of each month presented and collected a bill for $3\frac{1}{2}$ cents per 100 pounds for the hauling. At the trial there was no question made of the good faith of the arrangement with Bruening; it was not questioned that the $3\frac{1}{2}$ cents was the fair cost of the hauling; that the sole object of the arrangement was to make the same delivery which was made by the Pan-handle Railroad, and at the same charge of 15 cents per 100 pounds.

During the continuance of this arrangement with Bruening, as shown in the evidence, the Kaufman Brewing Company of Cincinnati made several shipments of beer in carloads by the Baltimore & Ohio route, on bills of lading in the form shown at pages 73, 74, and 75 of the record. Each of these shipments was consigned to the "Kaufman Brewing Company, care of or notify Henry Wolf, Pittsburg, Pennsylvania, to order of shipper," and was taken at the fifth-class rate of 15 cents per 100 pounds, as shown on the face of the bill. Henry Wolf was a wholesale dealer in beer in Pittsburg, whose warehouse was near the station of the Baltimore & Ohio Railroad Company, but was not connected by track with any railroad. The bills of lading for the Kaufman Brewing Company's shipments were transmitted through bank with draft attached, and Mr. Wolf testified that, after he received notice from the railroad company of the arrival of each shipment, he went to the bank and paid the draft, received the bill of lading and, on presenting it and paying 15 cents per 100 pounds, received the beer, which he hauled to his warehouse at his own expense. . . .

MR. JUSTICE BREWER delivered the opinion of the court:

Accepting the statement of facts made by the defendant as correct (and there is nothing in the statement which makes to his prejudice, or omitted from that statement which would be to his advantage), we are of opinion that the verdict and judgment were right, and must be sustained. . . .

It will be observed that, in order to induce Mr. Bruening to transfer his transportation from a competing road to its own line, the Baltimore

& Ohio Railroad Company, through the defendant, in the first place, made an arrangement by which for 15 cents per hundredweight it would bring the beer from Cincinnati and deliver it at his warehouse; that afterwards this arrangement was changed, and it delivered the beer to Mr. Bruening at its depot, and allowed him $3\frac{1}{2}$ cents per hundred for carting it to his warehouse. As Mr. Bruening had the benefit of a siding connection with the competing road and could get the beer delivered over that road at his warehouse for 15 cents, it apparently could not induce him to transfer his business from the other road to its own without extending to him this rebate. During all this time it was carrying beer for Mr. Wolf from the same place of shipment (Cincinnati) to the same depot in Pittsburg, and charging him 15 cents therefor. Mr. Wolf had no siding connection with the rival road, and therefore had to pay for his cartage by whichever road it was carried. His warehouse was in a direct line 140 yards from the depot, while Mr. Bruening's was 172 yards, though the latter generally carted the beer by a longer route, on account of the steepness of the ascent. Now, it is contended by the defendant that it was necessary for the Baltimore & Ohio Company to offer this inducement to Mr. Bruening in order to get his business, and not necessary to make the like offer to Mr. Wolf, because he would have to go to the expense of carting by whichever road he transported; that therefore the traffic was not "under substantially similar circumstances and conditions" within the terms of Section 2. We are unable to concur in this view. Whatever the Baltimore & Ohio Company might lawfully do to draw business from a competing line, whatever inducements it might offer to the customers of that competing line to induce them to change their carrier, is not a question involved in this case. The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another. Counsel insist that the purpose of the section was not to prohibit a carrier from rendering more service to one shipper than to another for the same charge, but only that for the same service the charge should be equal, and that the effect of this arrangement was simply the rendering to Mr. Bruening of a little greater service for the 15 cents than it did to Mr. Wolf. They say that the section contains no prohibition of extra service or extra privileges to one shipper over that rendered to another. They ask whether if one shipper has a siding connection with the road of a

carrier it cannot run the cars containing such shipper's freight onto that siding and thus to his warehouse at the same rate that it runs cars to its own depot, and there delivers goods to other shippers who are not so fortunate in the matter of sidings. But the service performed in transporting from Cincinnati to the depot at Pittsburg was precisely alike for each. The one shipper paid 15 cents a hundred; the other, in fact, but $11\frac{1}{2}$ cents. It is true he formally paid 15 cents, but he received a rebate of $3\frac{1}{2}$ cents, and regard must always be had to the substance, and not to the form. Indeed, the section itself forbids the carrier "directly or indirectly by any special rate, rebate, drawback, or other device" to charge, demand, collect, or receive from any person or persons a greater or less compensation, etc. And Section 6 of the act, as amended in 1889, throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to "state separately the terminal charges, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges." It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor.

It may be that the phrase "under substantially similar circumstances and conditions," found in Section 4 of the act, and where the matter of the long and short haul is considered, may have a broader meaning or a wider reach than the same phrase found in Section 2. It will be time enough to determine that question when it is presented. For this case it is enough to hold that that phrase, as found in Section 2, refers to the matter of carriage, and does not include competition.

We see no error in the record, and the judgment of the district court is affirmed.

QUESTIONS

1. What is the exact nature of the discrimination in the case quoted?
2. Why was it necessary to state in the evidence the rate charged Mr. Wolf as well as that charged Mr. Bruening?
3. What circumstances or conditions would be considered dissimilar under Section 2 of the act?
4. The Baltimore and Ohio Railroad sells a ticket which provides transportation for each of ten or more passengers at two thirds the rate charged one person. Is this a personal discrimination?

5. A corporation owning a railroad company offers \$50,000 to a meat-packing company provided the latter builds a plant on the railroad company's lines and contracts to ship by that line for a period of fifteen years. Is this a violation of Section 2?

6. A railroad company pursuant to a prior arrangement gives long credit to one shipper and collects from others promptly. Actual rates billed are the same to all. The government contends that this is unfair discrimination. Decide.

7. A carrier employs a shipper to perform a service, such as carrying over private tracks to the rails of the carrier, and pays an excessive compensation for the work. Is this a discrimination in violation of the statute?

8. Train conductors are required to collect twenty-five cents above the regular tariff from passengers who have not previously purchased tickets. Is this an unjust discrimination?

9. A carrier makes a contract with a stockyards company under the terms of which the company will take exclusive charge of the receiving and delivery of all live stock shipped to that destination. Is such a contract valid?

10. A carrier does not charge demurrage on cars owned by private companies when such cars are left on its tracks over a specific length of time. Demurrage is charged on other cars under similar conditions. It is charged that undue discrimination is shown. Decide.

11. A railroad carries the baggage of a passenger without extra charge. It is claimed that this is undue discrimination against passengers traveling without baggage. Decide.

12. A carrier entering Richmond, Virginia, absorbs switching charges when the switching line competes with it, and refuses to absorb such charges when the switching line does not compete with it. Is this a case of unjust discrimination?

13. Cars are placed by carriers on the sidings of commercial houses, where they are loaded with less-than-carload shipments. Thence they are hauled by the carrier to a local freight or transfer station and their contents sorted and reassembled in the usual manner. No extra charge is made for such service. Is the service illegal?

14. Lower rates are granted on shipments of fuel coal to railroad companies than on coal to commercial companies in the same place. It is alleged that this is unfair discrimination. Decide.

b. UNDUE PREFERENCE IN FAVOR OF ANY PERSON, FIRM,
LOCALITY, OR KIND OF TRAFFIC

[A]

Import Rate Case

United States Supreme Court (1896), 162 U.S. 197

This was an appeal from a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming a decree of the Circuit Court of the United States for the Southern District of New York, filed October 5, 1892.

The original bill of complaint was brought by the Interstate Commerce Commission, created by virtue of an act of Congress, entitled "An act to regulate commerce," approved February 4, 1887, c. 104, 24 Stat. 379, as amended by an act approved February 10, 1891, c. 128, 26 Stat. 743, against the Texas and Pacific Railway Company, a corporation chartered and existing under and by virtue of the laws of the United States, having its principal office at New York City.

The object of the bill was to compel the defendant company to obey an order of the Interstate Commerce Commission, made on January 29, 1891, whereby the said defendant was ordered to "forthwith cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading destined to any place within the United States, at any other than upon the inland tariff covering other freight from such port of entry to such place of destination, or any other than the same rates established in such inland tariff for the carriage of other like kind of freight, in the elements of bulk, weight, value and expense of carriage"; and which order the said defendant was alleged to have wholly disregarded and set at naught.

It appears by the bill that on March 23, 1889, the Commission, of its own motion and without a hearing of the parties to be affected, had made a certain order wherein, among other things, it was provided as follows :

"Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights." 2 Interstate Com. Com. Rep. 658.

Subsequently complaint was made to the Interstate Commerce Commission, in a petition filed by the New York Board of Trade and Transportation, that certain railroad companies were disregarding said order, and, in violation of the act to regulate commerce, were guilty of unjust discrimination in that they were in the habit of charging the regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other Western points, while charging other persons rates which were lower and even 50 per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions, when the property was delivered to them at New York or Philadelphia by vessel or steamship lines, under through bills of lading from foreign ports and foreign interior points, issued under an arrangement between the said railroad companies and such vessels and steamship lines and foreign railroads, for the continuous carriage at joint rates from the point or port of shipment to Chicago and other Western points, the railroad companies' share of each through rate being lower than their regular tariff rates.

The Commercial Exchange of Philadelphia and the San Francisco Chamber of Commerce intervened and became parties complainant also.

The companies first warned and called upon to answer the complainant were the Pennsylvania Railroad Company, the Pittsburgh, Ft. Wayne and Chicago Railway Company, and the Pittsburgh, Cincinnati and St. Louis Railway Company, but, after the coming in of the answers of said companies, it was deemed necessary to make quite a number of other railroad companies parties defendant — among them the Texas and Pacific Railway Company, the defendant in the present case, and the Southern Pacific Company. The several defendant companies filed answers. The answer of the Texas and Pacific Railway Company, admitting that both before and since March 23, 1889, it had carried imported traffic at lower rates than it contemporaneously charged for like traffic originating in the United States, justified by claiming that through shipments from a foreign country to the interior of the United States differ in circumstances and conditions from shipments originating at the American seaboard bound for the same interior points, and that defendant company has a legal right to accept for its share of the through rate a lower sum than it receives for domestic shipment to the same destination from the point at which the imported traffic enters the country.

The result of the hearing before the Interstate Commerce Commission was, so far as the present case is concerned, that the Commission held that the Texas and Pacific Railway Company was not justified in accepting, as its share of a through rate on imported traffic, a less charge or sum than it charged and received for inland traffic between the port of reception and the point of delivery, and the said order of January 29, 1891, commanding that said company desist from distinguishing in its charges between foreign and inland traffic, was made. 4 Interstate Com. Com. Rep. 447.

As the Texas and Pacific Railway Company declined to observe said order, the Commission filed its present bill against said company in the Circuit Court of the United States for the Southern District of New York.

The railway company filed a plea in abatement, denying that its principal office was in the Southern District of New York, and denying that it had violated or disobeyed the order of the Commission within the state of New York, or at any place within the jurisdiction of the Circuit Court. Certain affidavits were filed, upon a stipulation, as to the facts, and, after hearing, the plea was overruled, and also a motion to dismiss the proceedings for want of jurisdiction was denied — and to these rulings exceptions were taken and allowed.

The defendant company answered, alleging that the Interstate Commerce Commission was not a corporation, person or body politic capable of bringing or maintaining this suit — that the petition or bill failed to allege or show any facts constituting a violation by the defendant of the order of January 29, 1891, and did not show or allege any specific act or acts by the defendant in violation of the act of Congress — that the Southern Pacific Company, as participant with the defendant in the making and division of the through rates, was a necessary party, and that the bill should be dismissed for want of such necessary party.

The answer, admitting that the company had charged and received, since January 29, 1891, rates for the transportation of commodities from Liverpool and London, England, via New Orleans and the Texas and Pacific Railway and the Southern Pacific Company to San Francisco, California, different from the rates charged and received for the transportation of inland commodities from New Orleans by the same route to San Francisco, asserted that it had a legal right so to do, and that such action was not in violation of the act of Congress regulating commerce, or of any valid order of the Interstate Commerce

Commission. The answer set up a number of facts which it alleged sustained its defense.

The cause was heard upon the petition, answer and sundry exhibits, and resulted in a decree declaring that the order of January 29, 1891, was lawful, and that the same had been disobeyed by the defendant, and enjoining the defendant from further continuing such disobedience of said order. An appeal, with errors assigned, was taken from this decree to the Circuit Court of Appeals of the Second Circuit, by which, on June 3, 1893, the decree of the Circuit Court was affirmed with costs (20 U.S. App. 1). An appeal was then taken, on errors assigned, from said decree to this court. . . .

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court. . . .

We come now to the main question of the case, and that is whether the Commission erred, when making the order of January 29, 1891, in not taking into consideration the ocean competition as constituting a dissimilar condition, and in holding that no circumstances and conditions which exist beyond the seaboard in the United States could be legitimately regarded by them for the purpose of justifying a difference in rates between import and domestic traffic.

The answer of the Texas and Pacific Railway Company to the petition of the New York Board of Trade and Transportation before the Interstate Commerce Commission, and the answer of said company to the petition of the Commission filed in the Circuit Court, allege that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco: That unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company: That the rates charged by it are not to the prejudice or disadvantage of New Orleans, and work no injury to that community, because, if said company is prevented from participating in said traffic, such traffic would move via

the other routes and lines aforesaid without benefit to New Orleans, but, on the contrary, to its disadvantage: That the foreign or import traffic is upon orders by persons, firms and corporations in San Francisco and vicinity buying direct of first hands in London, Liverpool, and other European markets; and if the order of the Commission should be carried into effect it would not result in discontinuance of that practice or in inducing them to buy in New Orleans in any event: That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City and other Missouri River points: And that by such order the defendant company would be prevented from competing for freight to important points in the state of Texas with the railroad system of that state, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission. These allegations of the answer were not traversed or denied by the Commission, but are confirmed by the findings of the Commission attached as an exhibit to the petition in the case; and by said findings it further appears that the proportion the Texas and Pacific Railway receives of the through rate is remunerative — that the preponderance of its empty cars go north during eight months of the year, and if something can be obtained to load, it is that much found, and anything is regarded as remunerative that can be obtained to put in its cars to pay mileage — that the competition which controls the making of rates to the Pacific coast is steamship by way of the Isthmus and in cheap heavy goods around Cape Horn — that the competition to interior points, such as Missouri River points and Denver, is from the trunk lines direct from the Atlantic seaboard — that the ships engaged in carrying to San Francisco around Cape Horn are almost wholly British bottoms — that the through bill of lading furnishes a collateral for the transaction of business, takes from the shipper and consignee both the care as to intermediate charges, elevators, wharves and cost of handling, and puts it on the carrier; it reduces the intermediate charges, very much facilitates the transaction of business, and helps to swell its volume — and that the tendency of the through bill of lading is to eliminate the obstacles between the producer and consumer, and it has done much in that direction.

These and other uncontroverted facts that appear in this record would seem to constitute "circumstances and conditions" worthy of consideration, when carriers are charged with being guilty of unjust

discrimination or of giving unreasonable and undue preference or advantage to any person or locality.

But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts — that it was shut up by the terms of the act of Congress, to consider only such “circumstances and conditions” as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada.

It is proper that we should give the views of the Commission in its own words :

The statute has provided for the regulation of interstate traffic by interstate carriers, partly by rail and partly by water, or all rail, shipped from one point in the United States to another destination within the United States, or from a point of shipment in the United States to a port of entry within the United States or an adjacent foreign country, or from a port of entry either within the United States or in an adjacent foreign country, on import traffic brought to such port of entry from a foreign port of shipment and destined to a place within the United States. In providing for this regulation the statute has also provided for the methods of such regulation by publication of tariffs of rates and charges at points where the freight is received and at which it is delivered, and also for taking into consideration the circumstances and conditions surrounding the transportation of the property. The statute has undertaken no such regulation from foreign ports of shipment to ports of entry either within the United States or to ports of entry in an adjacent foreign country, and as between these ports has provided for no publication of tariffs of rates and charges, but has left it to the unrestrained competition of ocean carriers and all the circumstances and conditions surrounding it. These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the states of the American Union by rail carriers; but as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States or a port of entry of an adjacent foreign country destined to a place within the United States should be carried at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States over the same line and in the same direction. To hold otherwise would be for the Commission to create exceptions to the operation of the statute not found in the statute; and no other power but Congress can create such exception in the exercise of legislative authority.

In the one case the freight is transported from a point of origin in the United States to a destination within the United States, or port of transshipment, if it be intended for export, upon open published rates, which must be reasonable and just, not unjustly preferential to one kind of traffic over another, and

relatively fair and just as between localities; and the circumstances and conditions surrounding and involved in the transportation of the freight are in a very high degree material. In the other case the freight originates in a foreign country, its carriage is commenced from a foreign port, it is carried upon rates that are not open and published, but are secret, and in making these rates it is wholly immaterial to the parties making them whether they are reasonable and just or not, so they take the freight and beat a rival, and it is equally immaterial to them whether they unjustly discriminate against surrounding or rival localities in such foreign country or not. Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports; it also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event upon a through bill of lading destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination, covering other like kind of traffic in the elements of bulk, weight, value and of carriage; and no unjust preference must be given to it in carriage or facilities of carriage over other freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and in its carriage from the port of entry to the place of its destination in the United States, the mere fact that it is foreign merchandise thus brought from a foreign port is not a circumstance or condition, under the operation of the act to regulate commerce, which entitles it to lower rates or any other preference in facilities and carriage over home merchandise, or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States for the same distance and over the same line. . . .

The act to regulate commerce will be examined in vain to find any intimation that there shall be any difference made in the tolls, rates or charges for, or any difference in the treatment of home and foreign merchandise in respect to the same or similar service rendered in the transportation, when this transportation is done under the operation of this statute. Certainly it would require a proviso or exception plainly ingrafted upon the face of the act to regulate commerce, before any tribunal charged with its administration would be authorized to decide or hold that foreign merchandise was entitled to any preference in tolls, rates or charges made for, or any difference in its treatment for, the same or similar service as against home merchandise. Foreign and home merchandise, therefore, under the operation of this statute, when handled and transported by interstate carriers, engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, rates, charges and treatment for similar services rendered.

The business complained of in this proceeding is done in the shipment of foreign merchandise from foreign ports through ports of entry of the United

States, or through ports of entry in a foreign country adjacent to the United States, to points of destination in the United States, upon through bills of lading. 4 Interstate Com. Com. Rep. 512-516.

It is obvious, therefore, that the Commission, in formulating the order of January 29, 1891, acted upon that view of the meaning of the statute which is expressed in the foregoing passages.

We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not. . . .

After an investigation made by the Commission on a complaint against the Texas and Pacific Railway Company and other companies by the boards of trade above mentioned, the result reached was the order of the Commission made on January 29, 1891, a disregard of which was complained of by the Commission in its bill or petition filed in the Circuit Court of the United States.

The Texas and Pacific Railway Company, a corporation created by laws of the United States, and also possessed of certain grants from the state of Texas, owns a railroad extending from the city of New Orleans, through the state of Texas, to El Paso, where it connects with the railroad of the Southern Pacific Company, the two roads forming a through route to San Francisco. The Texas and Pacific Railway Company has likewise connections with the other railroads and steamers, forming through freight lines to Memphis, St. Louis and other points on the Missouri River, and elsewhere.

The defendant company admitted that, as a scheme or mode of obtaining foreign traffic, it had agencies by which, and by the use of through bills of lading, it secured shipments of merchandise from Liverpool and London, and other European ports, to San Francisco and to the other inland points named. It alleged that, in order to get this traffic, it was necessary to give through rates from the places of shipment to the places of final destination, and that, in fixing said rates, it was controlled by an ocean competition by sailing and steam vessels by way of the Isthmus and around the Horn, and also, to some extent, by a competition through the Canada route to the Pacific coast. These rates, so fixed and controlled, left to the defendant company and to the Southern Pacific Company, as their share of the charges made and collected, less than the local charges of said companies in transporting similar merchandise from New Orleans to San Francisco, and so, too,

as to foreign merchandise carried to other inland points. The defendant further alleged that unless it used said means to get such traffic the merchandise to the Pacific coast would, none of it, reach New Orleans, but would go by the other means of transportation; that neither the community of New Orleans nor any merchant or shipper thereof was injured or made complaint — that the traffic thus secured was remunerative to the railway company and was obviously beneficial to the consumers at the places of destination, who were thus enabled to get their goods at lower rates than would prevail if this custom of through rates was destroyed.

As we have already stated, the Commission did not charge or find that the local rates charged by the defendant company were unreasonable, nor did they find that any complaint was made by the city of New Orleans, or by any person or organization there doing business. Much less did they find that any complaint was made by the localities to which this traffic was carried, or that any cause for such complaint existed.

The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the "circumstances and conditions" attendant upon the foreign traffic as such "circumstances and conditions" as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its pro-rata share of such rates, was an act of "unjust discrimination," within the meaning of the act.

In so construing the act we think the Commission erred.

As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case — among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the mer-

chandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interests of the public.

Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions and, therefore, most likely to have been the construction intended by the lawmaking power. Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally to be attributed to Congress. The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act.

The principal purpose of the second section is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in given cases, were or were not unjust, there must be a consideration of the several questions whether the services rendered were "like and contemporaneous," whether the kinds of

traffic were "like," whether the transportation was effected under "substantially similar circumstances and conditions." To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended that whatever would be regarded by common carriers, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not "unjust." Some charges might be unjust to shippers — others might be unjust to the carriers. The rights and interests of both must, under the terms of the act, be regarded by the Commission.

The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question. . . .

The conclusion that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations: That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the

circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment: That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered: That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. . . .

The circuit court did not discuss the case at length, either as to its law or facts, but, in effect, approved the order of January 29, 1891, as valid, and enjoined the defendant company from disregarding it.

The decree of the circuit court of appeals is reversed; the decree of the circuit court is also reversed; and the cause is remanded to that court, with directions to dismiss the bill. . . .

[B]

United States *v.* Illinois Central R. R. Co.

United States Supreme Court (1924), 263 U.S. 515

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases, brought to set aside orders of the Interstate Commerce Commission, were argued together, and present, in the main, the same questions of law. In each, carriers who were found to have unjustly

discriminated against shippers of lumber located on an independent short line were ordered by the Commission to cease and desist from charging them higher through rates than were contemporaneously charged for like services from other points within what is called blanket territory. . . .¹ In No. 40 the Federal court for southern Mississippi perpetually enjoined the enforcement of the order issued by the Commission in *Swift Lumber Co. v. Fernwood & Gulf R. R. Co.*, 61 I. C. C. 485. In No. 38 the Federal court for Wyoming dismissed the bill; thus sustaining the order issued by the Commission in *Pioneer Lumber Co. v. Director General*, 64 I. C. C. 485. Each case is here on direct appeal under the act of October 22, 1913, c. 32, 38 Stat. 208, 220.

The facts in No. 40 present most of the questions of law requiring discussion. The so-called blanket territory, which extends south from Jackson, Mississippi, to the Gulf of Mexico (about 200 miles), and from the Mississippi River into Alabama, produces yellow pine lumber in quantity. Through this territory, the Illinois Central Railroad extends from New Orleans to Jackson and thence to the Ohio River crossings and leading lumber markets of the North. Partly by its main line, partly, also, by branches, and partly by connections with independent lines, it serves a large percentage of the lumber mills in the territory. From all these points on the Illinois Central main line, from all on its branches, from all on three independent short lines which connect indirectly with it, and from all on the Mississippi Central (a longer independent line which crosses it running east and west) the carriers have established the same through lumber rates to the northern markets, regardless of the varying distances within the blanket territory. At Fernwood, Mississippi, a little south of its Monticello branch, the Illinois Central connects with the Fernwood & Gulf, an independent short line, on which the Swift Lumber Company has a mill at Knoxo. The distance from Knoxo to the junction is 27 miles. The joint through rate from Knoxo via Fernwood to northern points, voluntarily established by these carriers, is 2 cents per 100 pounds higher than the rate from Fernwood or any other point within the so-called blanket territory on the Illinois Central main or branch lines or on the connection mentioned above. The distance to the northern markets from many of the points on these lines is much greater than the distance from Knoxo, which lies near the center of the so-called blanket territory.

¹ Footnotes are omitted throughout this case.

The Swift Lumber Company instituted proceedings before the Commission against the Illinois Central, the Fernwood & Gulf, and connecting carriers in which it attacked the higher rates from Knoxo both as unreasonable, under Section 1 of the Act to Regulate Commerce, and as unjustly discriminatory, under Section 3. The Commission found that the rates from Knoxo were not unreasonable; but that they subject the lumber company to undue prejudice, in view of the lower rates so given competing points within the so-called blanket territory. The order directed the carriers "according as they participate in the transportation . . . to cease and desist" from the discrimination found. All the carriers except the Illinois Central and the Fernwood & Gulf acquiesced in the order. These two joined as plaintiffs in this suit, and urge on several grounds that the order is void.

First. It is contended that the order exceeds the powers of the Commission. The argument is that a carrier cannot be held to have participated in an unjust discrimination unless it is a party both to the rate by which a preference has been given to others and to the higher rate which is given to the complainant; that the Fernwood & Gulf did not participate in the discrimination complained of, since it did not join in the lower rates from other points by which the Swift Lumber Company claims to be prejudiced; and hence, that it cannot be required to coöperate with the Illinois Central in reducing rates from Knoxo which have been found to be inherently reasonable. That, on the other hand, the Illinois Central cannot be held to have subjected the Swift Lumber Company to undue prejudice, since Knoxo is not on its own lines and it is not in a position to remove, by its own act, the discrimination complained of. Neither proposition is sound. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. By joining with the Illinois Central in establishing the prejudicial through rate from Knoxo, the Fernwood & Gulf became as much a party to the discrimination practiced as if it had joined also in the lower rates to other points which are alleged to be unduly preferential. Compare *St. Louis Southwestern Ry. Co. v. United States*, 245 U.S. 136, 144. If such were not the law, relief on the ground of discrimination could never be had against preferential rates given by a great railway system to points on its own lines which result in undue prejudice to shippers on short lines connecting with it. Moreover, it is not true that the Illinois Central cannot remove the discrimination without the coöperation of the Fernwood & Gulf. The order leaves the carriers free to remove the discrimination

either by making the Knoxo rate as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate. *American Express Co. v. Caldwell*, 244 U.S. 617, 624. The Illinois Central, acting alone, is in a position to raise the rate from Fernwood. For its main line extends from there to the Ohio River crossings, the rate-breaking point.

Second. It is contended that the order of the Commission is unsustained by proof. That there is discrimination against Knoxo is not denied. The rates charged from that station are higher than those charged from competing points within the so-called blanket territory for transportation of the same commodity, to the same market, for the same or longer distances, mainly over the same route; some of these competing points being located on the Illinois Central main line, some on its branch lines, and some on independent lines. But mere discrimination does not render a rate illegal under Section 3. Only such rates as involve unjust discrimination are obnoxious to that section. *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481. There is no claim that any one of the evidential facts found by the Commission and relied upon to show that the discrimination was unjust, is without adequate supporting evidence. The argument is that these facts, even when supplemented by others appearing in the evidence, do not warrant the finding of the ultimate fact, that the higher rates from Knoxo are unduly prejudicial to the Swift Lumber Company to the extent that they exceed the blanket basis of rates from Fernwood (the junction with the Illinois Central) and other points.

A carrier is entitled to initiate rates and, in this connection, to adopt such policy of rate-making as to it seems wise. . . . In the exercise of this right, the Illinois Central adopted the policy of establishing blanket, or group, rates on its main and branch lines, by which the remoter lumber-producing points were granted, regardless of distances within the territory, the same rates to northern markets as points located nearer. In the exercise of the same right to initiate rates, the Illinois Central adopted, also, the policy of granting to connecting independent short lines, and to longer connecting carriers, an allowance (called shrinkage or absorption) by reason of which the Illinois Central's division of the through rate on traffic originating on connections is reduced, by the amount of the allowance, to lessen its rate for freight originating on its own line at the junction point. The Illinois Central insists that its general policy is not to grant to points on connecting lines the blanket, or junction-point rate; and that it departs from this

policy only when it is compelled by competition to do so. Where the through rate is the same from points on the connecting line as it is from the junction, the share or division of the connecting carrier consists wholly of this absorption. Where the through rate from points on the connection is higher than the junction-point rate, the connecting line receives as its share an additional amount consisting of the difference between these rates. This additional amount is called the arbitrary or differential. Thus, the Fernwood & Gulf receives a division of 4 cents per 100 pounds, consisting of a 2-cent absorption and a 2-cent arbitrary.

The Illinois Central argues that the discrimination in charging a higher rate from Knoxo cannot be deemed unjust since the preferential rate to other points was granted solely for the purpose of increasing its own business, and that the lower rate from Knoxo was denied solely in order to preserve its own revenues. In other words, it granted the blanket rate to all points on its own lines in order to develop business originating thereon. It declined to grant the blanket rate (and to increase the absorption) where the connecting line was wholly dependent upon it; and traffic originating thereon could be secured in spite of the higher rate. It granted the blanket rate to points on connecting lines (and increased their absorptions) where this was deemed necessary in order to secure traffic which might otherwise go to competitors.

The effort of a carrier to obtain more business and to retain that which it had secured, proceeds from the motive of self-interest, which is recognized as legitimate; and the fact that preferential rates were given only for this purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 209 U.S. 108, 122. Self-interest of the carrier may not override the requirement of equality in rates. It is true that the law does not attempt to equalize opportunities among localities (*Interstate Commerce Commission v. Diffenbaugh*, 222 U.S. 42, 46); and that the advantage which comes to a shipper merely as a result of the position of his plant does not constitute an illegal preference (*Ellis v. Interstate Commission*, 237 U.S. 434, 445). To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal, unless it is shown that it is not justified by the cost of the respective services, by their values, or

by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. *American Express Co. v. Caldwell*, 244 U.S. 617, 624.

Every factor urged by the carrier as justifying the higher rate from Knoxo appears to have been considered by the Commission. How much weight shall be given to each must necessarily be left to it. The Commission found, among other things, that the cost of the service from Knoxo was not greater than the cost of transportation from many other points which enjoy the lower rate; that the value of the service was the same; and that other traffic conditions incident to shipment from Knoxo were so similar to those of shipments from other points enjoying a lower rate that the prejudice to which the Swift Lumber Company had been subjected was undue and unreasonable. The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law, by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or for securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. Such was the law even before Transportation Act 1920. . . . In view of the policy and provisions of that statute, the Commission may properly have concluded that the carrier's desire to originate traffic on its own lines, or to take traffic from a competitor, should not be given as much weight in determining the justness of a discrimination against a locality as theretofore. For now, the interests of the individual carrier must yield in many respects to the public need (*Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *New England Divisions Case*, 261 U.S. 184); and the newly conferred power to grant relief against rates unreasonably low may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable. The order of the Commission was not an attempt to establish its own policy of rate-making. . . . It merely expressed the judgment of the Commission that existing rates subjected shippers from Knoxo to undue prejudice. The judgment so exercised, being supported by ample evidence, is conclusive.

Third. The Fernwood & Gulf contends that the order is obnoxious to the due-process clause. The argument is that even its present divi-

sion of 4 cents per 100 pounds is unremunerative; and that a smaller return would be confiscatory. To this argument there are several answers. The order does not require the reduction of the through rate. It may be complied with by raising the rate from Fernwood and other points now being preferred. Moreover, a reduction of the through rate would not necessarily result in decreasing the amount of the short line's division. The Commission may, upon application, accord to the Fernwood & Gulf the appropriate division. New England Divisions Case, 261 U.S. 184. There is no suggestion that the resulting reduction of the Illinois Central's division would result in rendering the rate confiscatory as to it. . . .

In No. 38, where the short line alone seeks to set aside the Commission's order, this additional fact requires mention. The rate to the short-line points is not a joint rate, but a combination of the trunk-line rate to the junction and the short-line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, expressed or implied. Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

In No. 40, decree reversed.

In No. 38, decree affirmed.

QUESTIONS

1. What individuals, groups, or kinds of traffic were discriminated against in the cases quoted?

2. Are all discriminations and preferences contrary to the provisions of the Interstate Commerce Act?

3. In a case involving a discrimination or preference what facts must the Commission consider?

4. What are the grounds on which the courts might set aside an order of the Commission similar to the one referred to in the case quoted?

5. Certain rates in Texas were found by the Commission to involve unreasonable discriminations against a city outside the state. The carriers concerned were ordered to readjust their rates so as to remove the discrimination. It was argued by the carriers that such an order exceeded the powers of the Commission. Decide.

6. Michigan and Kansas compete in the sale of salt in St. Louis and other Missouri cities. Michigan, because of its location, and particularly because

218 GOVERNMENT AND RAILROAD TRANSPORTATION

of the opportunity for part shipment by water, is given the better freight rate by the carriers concerned. Salt manufacturers of Kansas protest. Decide.

7. A railroad gives a better rate to a large city than to a smaller one similarly located. Its grounds for the discrimination are that shipments of various articles from the first are greater than those from the second. Is this an unfair preference?

8. Omaha and Council Bluffs are located on opposite sides of the Missouri River. The rates from Omaha to Iowa points are higher than those from Council Bluffs. Omaha claims that this is a violation of the statute. Decide.

9. On the grounds that cars could be used more profitably on another part of its lines, a railroad refuses a pro-rata allotment to shippers in a certain locality. Does this discriminate unfairly against the locality?

10. Trunk-line carriers grant a rate of three cents per one hundred pounds less than the New York rate on shipments from the Middle West to Baltimore. It is charged that this gives Baltimore an unfair preference. Decide.

11. Certain railroads charge a much higher rate on flour than on grain in order to promote the milling of flour in certain towns which they serve. Is this a violation of Section 3 of the statute?

12. Railroads in the United States combine with ocean-steamship companies to secure traffic to inland points. The pro-rata share of the proceeds of this traffic that is secured by the railroads is less than the through charge made on domestic shipments between the port of entry and the inland destination. Is such action by the carriers a violation of Section 3 of the act?

13. A state limits passenger rates to 2 cents a mile, whereas interstate rates are 3.6 cents. The Commission alleges that such state rates work undue prejudice on interstate commerce and orders a horizontal increase throughout the state. Can the Commission do this legally under its power to remove undue prejudice or preference between intrastate and interstate commerce?

14. Cement is carried at a lower rate than wall plaster. It is claimed that this is undue discrimination against the latter. Decide.

15. Three steam railroads and an electric road engaged in the transportation of freight and passengers enter Michigan City, Indiana. The steam roads refuse to enter into reciprocal switching agreements with the electric road, although they have such agreements among themselves. Has the Commission the power to force them to enter into such agreements?

16. Within a certain zone in the city of York, Pennsylvania, two railroads extend to industries connected by spur with either of the roads the privilege of shipping freight by either road without the payment of switching charges. Industries in the city located on one of the roads, but outside the zone, are compelled to pay a switching charge if their freight is received by one road to be shipped over the other. It is urged that this constitutes undue preference. Decide.

17. To increase its east-bound traffic, the Virginian Railway enters into a trackage agreement with the Chesapeake and Ohio. As an incidental result of this agreement forty-five mines on the Virginian enjoy lower rates to the west than do fifty-four other mines similarly located. The Virginian contends that any preference that may exist is merely an incident in the road's attempt to develop its traffic. It is contended that the Commission should order that all mines be given similar rates. Decide.

18. In an order removing certain discriminations in express rates that have injured Sioux City, Iowa, the Commission has created a condition which is alleged to be injurious to several towns in South Dakota. Representatives of firms in these towns seek to enjoin the putting into effect of these rates. Will an injunction issue?

19. Some railroads allow to shippers on their lines the privilege of creosoting in transit. Two other railroads maintaining joint rates with the first roads are accused of unjust discrimination because they refuse to allow the creosoting privilege at a point on their lines. Decide.

20. A through rate is higher than the aggregate of intermediate rates. Will the Commission approve the maintenance of such a rate?

21. A railroad charges a lower rate for manufactured products than it does for the raw product from which they are made. Is this undue or unreasonable prejudice?

22. Is a discrimination in favor of stone and gravel for use in public works and consigned to Federal, state, or local authorities unlawful?

23. The discrimination described in Question 22 results in giving to a single quarry all government business within a state. Has the Commission the power to forbid it?

24. If certain rates charged by a railroad are attacked as discriminatory, is it sufficient defense for the railroad to show that they were established for the purpose of developing traffic on its own lines or for securing competitive traffic?

25. To what extent will the courts inquire into the facts of discrimination and prejudice in cases that may be appealed to them?

2. PENALTIES

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 10, paragraph 1 (the proviso) and paragraph 4, and the Elkins Act, Section 1 (omitting the first part of the first paragraph and the last half of the second), and the first half of Section 3 (I. C. Act, pp. 30, 31, 88-91). Paragraph 4 of Section 10 and the proviso of para-

220 GOVERNMENT AND RAILROAD TRANSPORTATION

graph 1 were added to the act by amendment in 1889, but the words "or attempt to induce" were interpolated in paragraph 4 in 1910, and the phrase "or the transmission of intelligence" was inserted in the proviso of paragraph 1 by the Transportation Act of 1920. The present text of Section 1 of the Elkins Act dates from 1906, when the words "whether carrier or shipper" and "knowingly" were placed in the sentence just preceding the proviso of Section 1; the proviso itself took the place of a sentence forbidding imprisonment, the words "or shipper" were introduced into the first sentence of the second paragraph, and the entire third paragraph was added.

The Interstate Commerce Commission has recommended that Section 10 be amended by providing therein a minimum fine of not less than \$500 for each offense (see IV, I, 5, [B], p. 286)].

QUESTIONS

1. In the Elkins Act is the phrase "whereby . . . property shall . . . be transported at a less rate than that named in the tariffs, or whereby any other advantage is given or discrimination is practiced" more or less comprehensive than the "unjust discrimination" of the Interstate Commerce Act?

2. Do you think it is sound policy to provide equally severe penalties for those who discriminate and those who induce or attempt to induce a discrimination?

3. What is the purpose of imposing a threefold forfeiture in addition to the penalties of fine and imprisonment?

4. The V railroad lends \$250,000 at 2 per cent to the L coal company to buy certain coal lands, borrowing the money on its own notes at 4 per cent. The lands were conveyed to the V company to secure the first loan, and the V company constructed at its own expense tracks to the mines on the land and obtained the exclusive tonnage of the L company to be carried at the lawful rate. Has the V company violated the Elkins Act?

5. A shipper ships one carload lot of goods on June 2, three carload lots on June 15, and five carload lots on June 20. On June 30 the railroad sends him a bill covering all three shipments. Assuming that a rebate is given on all the shipments, how many offenses against the Elkins Act has the shipper committed?

6. Is a stockholder of a corporation which receives a rebate from a carrier guilty of a violation of the act?

7. The owner of a packing plant builds on his own property private tracks extending from the tracks of the C railroad to and around his buildings. The railroad refunds to him \$1 a car on his shipments for the use of these tracks. Is this rebate within the Elkins Act?

8. Is it a discrimination, under the Elkins Act, for a carrier to agree to expedite a shipment taken at the regular rates so that it will reach its destination at a given time, where no rate for such expediting has been established?

9. Is it necessary to show evil or malicious intent to establish a violation of the act? Explain the term "knowingly."

[B]

United States *v.* P. Koenig Coal Company

United States Supreme Court (1926), 270 U.S. 512

[On July 25, 1922, the Interstate Commerce Commission, acting under Section 1, paragraph 15, of the Interstate Commerce Act, issued Service Order No. 23 declaring there was an emergency upon the railroad lines east of the Mississippi River and directing that coal cars should be furnished to coal mines according to a certain order of purposes numbered in classes 1, 2, 3, 4, and 5, and that no coal embraced in classes 1, 2, 3, and 4 should be reconsigned or diverted except for some purpose in the same class or a superior one. Hospitals were in class 2; automobile factories, in a lower class. The Koenig Coal Company was indicted, in a Federal district court, under Section 1 of the Elkins Act, for knowingly receiving concessions from a carrier in respect of transportation of property in interstate commerce, obtained by deceitful representation. The court sustained a demurrer to the indictment, and the government appealed.]

MR. CHIEF JUSTICE TAFT delivered the opinion of the court :

... The first count of the indictment charged that the defendant intending to obtain a preference and priority in transportation, which it was not then lawfully entitled to receive, and to procure the coal for the use of Dodge & Company engaged in the manufacture of automobiles and parts thereof, sent a telegraphic order to the Monitor Coal & Coke Company of Huntington, West Virginia, asking the shipment of carloads of coal to the Koenig Coal Company at Detroit for the use of the Samaritan Hospital, that it thereby secured the furnishing by the C. & O. Company on August 5, 1922, at the request of the Monitor Company, of one car suitable for the loading and transportation of coal on its line in West Virginia, which was billed and consigned in accordance with the telegraphic order; that when it reached Detroit, the defendant diverted the car to Dodge Brothers who used the coal,

the Samaritan Hospital not needing or requiring the coal, and not having authorized or requested the defendant to send the order; that the concession and discrimination was thus obtained by a deceitful device of which the carriers had no knowledge. The other seventeen counts are similar and refer to different cars of coal, some of them to different mines and consignors and some to different beneficiaries of the trick as actual consumers of the coal.

The demurrer challenged the indictment on various grounds, first, that the facts charged did not constitute a concession given or a discrimination practiced by the Elkins Act. . . . [The other grounds, dealing with the validity of Service Order No. 23, are omitted.]

Counsel for the defendant in his brief and argument supports the demurrer solely upon the same ground upon which the district court sustained it, namely, that the offense under which the indictment is drawn cannot be committed without guilty knowledge and collusion of both the shipper and the carrier. . . . [The court here quotes the relevant part of Section 1 of the Elkins Act.]

This makes it unlawful for anyone to receive any concession in respect of transportation of any property in interstate commerce by a common carrier whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was a priority or preference in securing the transportation of coal in an emergent congestion of the traffic. It was certainly a concession, and one of value to one who under the law or the regulations having the force of law could not secure that priority. The words advantage, concession, and discrimination in the statute must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination. It is asked, If this was a concession, by whom was it conceded? The answer is, By the carrier. He granted the priority and therefore he made the concession and gave the advantage and practiced the discrimination. But it was unlawful and he did not know the facts which made it so. The shipper knew them because he had secured it by his deceit and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession and gave him the advantage and made the discrimination thought it was lawful?

Reference is made to the debates in Congress and to decisions of this court to show that in the minds of the legislators in enacting the

Elkins Act, the discrimination and inequality they sought to prevent had in the past arisen chiefly from collusion between the carrier and the shipper. As practical men of course they knew that this was the way in which violations of the law were most likely to occur. But this does not at all justify the conclusion that Congress in enacting the Elkins Law intended to limit the offenses described in it to cases of collusion, if otherwise the acts charged came within the words of the statute.

We have often declared that the purpose of Congress in the Elkins Law was to cut up by the roots every form of discrimination, favoritism, and inequality. . . . [The citation of cases is omitted.] It would be contrary, therefore, to the general intent of the law to restrain the effect of the language used so as not to include acts exactly described when they clearly effect discrimination and inequality. Certainly no one would say that a shipper might not be convicted under the act of soliciting an unlawful concession or advantage or discrimination even though the carrier refused to extend it to him. So, too, if a carrier offers an unlawful advantage to a shipper who declines it, clearly the carrier may be indicted and punished. Collusion is not necessary in such a case. Why in this? The act is plainly not confined to joint crimes. The general rule that criminal statutes are to be strictly construed has no application when the general purpose of the legislature is manifest and is subserved by giving the words used in the statute their ordinary meaning and thus covering the acts charged. . . .

Judgment reversed.

QUESTIONS

1. D, the agent of a carrier, is in charge of the distribution of cars among coal mines during a car shortage. By a trick he violates the rule of distribution fixed by the Interstate Commerce Commission and secures an excessive number of cars for mine X, making a personal profit from the sale of the excess. The operators of mine X do not know of the violation of the rule. Has D violated Section 1 of the Elkins Act?

2. H, a shipper, undervalues his goods in order to obtain the lower of two rates based on valuation. Has he violated Section 1 of the Elkins Act? In an action to recover damages for the loss of the goods, is H estopped from recovering a greater value than his own valuation, the carrier having no knowledge of the value of the shipment?

H. LONG AND SHORT HAUL PRINCIPLE

1. INTERSTATE COMMERCE ACT

[A¹]

SECTION 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

[B]

Interstate Commerce Commission *v.* Alabama Midland
Railway Company

United States Supreme Court (1897), 168 U.S. 144

Statement by MR. JUSTICE SHIRAS:

On the 27th day of June, 1892, the Board of Trade of Troy, Alabama, filed a complaint before the Interstate Commerce Commission at Washington, District of Columbia, against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, claiming that in the rates charged for transportation of property by the railroad companies mentioned and their connecting lines there is a discrimination against the town of Troy, in violation of the terms and provisions of the Interstate Commerce Act of Congress of 1887.

¹ Section 4 of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. L. 379.

The general ground of complaint is, that Troy being in active competition for business with Montgomery, the defendant lines of railway unjustly discriminate in their rates against the former, and give the latter an undue preference or advantage in respect to certain commodities and classes of traffic. The specific charges insisted on at the hearing, and to which the testimony relates, are:

1. That the Alabama Midland Railway and the defendant roads forming lines with it from Baltimore, New York, and the east to Troy and Montgomery charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments *through Troy* to Montgomery; the latter being the longer distance point by fifty-two miles.

2. That the Alabama Midland Railway and Georgia Central Railroad and their connections unjustly discriminate against Troy and in favor of Montgomery in charging and collecting \$3.22 per ton to Troy on phosphate rock shipped from the South Carolina and Florida fields and only \$3 per ton on such shipments to Montgomery, the longer distant point by both of said roads: and that all phosphate rock carried from said fields to Montgomery over the road of the Alabama Midland has to be hauled through Troy.

3. That the rates on cotton, as established by said two roads and their connections, on shipments to the Atlantic seaports, Brunswick, Savannah, and Charleston, unjustly discriminate against Troy and in favor of Montgomery, in that the rate per hundred pounds from Troy is 47 cents, and that from Montgomery, the longer distance point, is only 40 cents, and that such shipments from Montgomery over the road of the Alabama Midland have to pass through Troy. . . .

The Commission, having heard this complaint on the evidence theretofore taken, ordered, on the 15th day of August, 1893, the roads participating in the traffic involved in this case "to cease and desist" from charging, demanding, collecting, or receiving any greater compensation in the aggregate for services rendered in such transportation than is specified, as follows, to wit: . . .

3. On shipments of cotton from Troy aforesaid for export through the Atlantic seaports, to wit, Brunswick, Savannah, Charleston, West Point, or Norfolk, no higher rate of charge to these ports than is charged and collected on such shipments from Montgomery aforesaid. . . .

5. On shipments of class goods from New York, Baltimore, or other northeastern points to Troy aforesaid, no higher rate of charge than

is charged and collected on such shipments through Troy to Montgomery aforesaid.

6. On shipments of phosphate rock from South Carolina and Florida fields to Troy aforesaid, no higher rate of charge than is charged and collected on such shipments through Troy to Montgomery aforesaid.

The defendants having failed to heed these orders, the Commission thereupon filed this bill of complaint in the circuit court of the United States for the middle district of Alabama, in equity, to compel obedience to the same. On the hearing in said court the bill of complaint was dismissed, and complainant, the Interstate Commerce Commission, appealed the cause to the United States circuit court of appeals for the fifth judicial circuit, at New Orleans, Louisiana. And, thereupon, in said last-named court, on the second day of June, 1896, the decree of the said circuit court of the United States for the middle district of Alabama was in all things duly affirmed; and from this judgment and decree the appellant has appealed to this court. . . .

MR. JUSTICE SHIRAS delivered the opinion of the court: . . .

Errors are assigned to the action of the court in having failed and refused to affirm and enforce the report and opinion of the Commission, wherein it was found and decided, among other things, that the defendant common carriers which participate in the transportation of class goods to Troy from Louisville, St. Louis, and Cincinnati, and from New York, Baltimore, and other northeastern points, and the defendant common carriers which participate in the transportation of phosphate rock from South Carolina and Florida to Troy, and the defendant common carriers which participate in the transportation of cotton from Troy to the ports of New Orleans, Brunswick, Savannah, Charleston, West Point, or Norfolk, as local shipments or for export, have made greater charges under substantially similar circumstances and conditions, for the shorter distance to or from Troy than for longer distances over the same lines in the same direction, and have unjustly discriminated in rates against Troy, and subjected said place and dealers and shippers therein to undue and unreasonable prejudice and disadvantage in favor of Montgomery, Eufaula, Columbus, and other places and localities and dealers and shippers therein, in violation of the provisions of the Act to Regulate Commerce.

Whether competition between lines of transportation to Montgomery, Eufaula, and Columbus justifies the giving to those cities a preference or advantage in rates over Troy, and, if so, whether such a state of facts justifies a departure from equality of rates without

authority from the Interstate Commerce Commission under the proviso to the 4th section of the act, are questions of construction of the statute, and are to be determined before we reach the question of fact in this case.

It is contended, in the briefs filed on behalf of the Interstate Commerce Commission, that the existence of rival lines of transportation, and, consequently, of competition for the traffic, are not facts to be considered by the Commission, or by the courts, when determining whether property transported over the same line is carried under "substantially similar circumstances and conditions," as that phrase is found in the 4th section of the act.

Such, evidently, was not the construction put upon this provision of the statute by the Commission itself in the present case, for the record discloses that the Commission made some allowance for the alleged dissimilarity of circumstances and conditions, arising out of competition and situation, as affecting transportation to Montgomery and Troy respectively, and that, among the errors assigned, is one complaining that the court erred in not holding that the rates prescribed by the Commission in its order made due allowance for such dissimilarity.

So, too, in case *Re Louisville & Nashville R. R. Co.*, 1 I. C. C. 77, in discussing the long and short haul clause, it was said by the Commission, per Judge Cooley, that "it is impossible to resist the conclusion that in finally rejecting the 'long and short haul clause' of the House bill, which prescribed an inflexible rule, not to be departed from in any case, and retaining in substance the 4th section as it had passed the Senate, both Houses understood that they were not adopting a measure of strict prohibition in respect to charging more for the shorter than for the longer distance; but that they were, instead, leaving the door open for exceptions in certain cases, and among others in cases where the circumstances and conditions of the traffic were affected by the element of competition, and where exceptions might be a necessity if the competition was to continue. And water competition was beyond doubt especially in view."

It is, no doubt, true that in a later case, *Railroad Commission of Georgia v. Clyde Steamship Co. et al.*, 5 I. C. C. Rep. 327, the Commission somewhat modified their holding in the *Louisville & Nashville Railroad Company Case*, just cited, by attempting to restrict the competition that it is allowable to consider to the cases of competition with water carriers, competition with foreign railroads, competition

with railroad lines wholly in a single state; but the principle that competition in such cases is to be considered is affirmed.

That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed, substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the circuit courts. . . .

But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the Act to Regulate Commerce is not an open question in this court.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, it was said, approving observations made by Jackson, circuit judge (43 Fed. 37), that the Act to Regulate Commerce was "not designed, . . . to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons traveling over the road; . . . (that) it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail; (that) it is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable"; and accordingly, it was held that the issue by a railway company, engaged in interstate commerce, of a "party-rate ticket" for the transportation of ten or more persons from a place situated in one state or territory to a place situated in another state or territory, at a rate less than that charged to a single individual for a like transportation on the same trip, does not thereby make "an unjust or unreasonable charge" against such individual within the meaning of the first section of the Act to Regulate Commerce; nor make "an unjust discrimination" against him within the meaning of the second section; not give "an undue or unreasonable preference or advantage" to the purchasers of the party-rate ticket within the meaning of the third section.

In *Texas & Pac. Railway v. Interstate Commerce Commission*, 162 U.S. 197, it was held that "in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as

of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered." . . .

In order further to guard against any misapprehension of the scope of our decision it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraint of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of "undue or unreasonable preference or advantage," or what are "substantially similar circumstances and conditions." The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration.

It is further contended, on behalf of the appellant, that the courts below erred in holding, in effect, that competition of carrier with carrier, both subject to the Act to Regulate Commerce, will justify a departure from the rule of the fourth section of the act without authority from the Interstate Commerce Commission, under the proviso to that section.

In view of the conclusion hereinbefore reached, the proposition comes to this, that, when circumstances and conditions are substantially dissimilar, the railway companies can only avail themselves of such a situation by an application to the Commission. . . .

The claim now made for the Commission is that the only body which has the power to relieve railroad companies from the operation of the long and short haul clause on the account of the existence of competition, or any other similar element which would make its application

unfair, is the Commission itself, which is bound to consider the question, upon application by the railroad company, but whose decision is discretionary and unreviewable. . . .

This view of the scope of the proviso to the fourth section does not appear to have ever been acted upon or enforced by the Commission. On the contrary, in the case of *Re Louisville & Nashville R.R. Company v. Interstate Commerce Commission*, 1 I. C. C. 57, the Commission, through Judge Cooley, said, in speaking of the effect of the introduction into the fourth section of the words "under substantially similar circumstances and conditions," and of the meaning of the proviso: "that which the act does not declare unlawful must remain lawful if it was so before; and that which it fails to forbid the carrier is left at liberty to do without permission of anyone. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the statute is not violated. . . . Beyond question the carrier must judge for itself what are the 'substantially similar circumstances and conditions' which preclude the special rate, rebate, or drawback, which is made unlawful by the second section, since no tribunal is empowered to judge for it until after the carrier has acted, and then only for the purpose of determining whether its action constitutes a violation of law. The carrier judges on peril of the consequences; but the special rate, rebate, or drawback which it grants is not illegal when it turns out that the circumstances and conditions were not such as to forbid it; and as Congress clearly intended this it must also, when using the same words in the fourth section, have intended that the carrier whose privilege was in the same way limited by them should in the same way act upon its judgment of the limiting circumstances and conditions."

The view thus expressed has been adopted in several of the circuit courts; . . . and we do not think the courts below erred in following it in the present case. We are unable to suppose that Congress intended, by the fourth section and the proviso thereto, to forbid the common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do, much less do we think that it was the intention of Congress that the decision of the Commission,

if applied to, could not be reviewed by the courts. The provisions of Section 16 of the act, which authorizes the court to "proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition," extend as well to an inquiry or proceeding under the fourth section as to those arising under the other sections of the act.

Upon these conclusions, that competition between rival routes is one of the matters which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line, we are brought to consider whether, upon the evidence in the present case, the courts below erred in dismissing the Interstate Commerce Commission's complaint.

As the third section of the act, which forbids the making or giving any undue or unreasonable preference or advantage to any particular person or locality, does not define what, under that section, shall constitute a preference or advantage to be undue or unreasonable, and as the fourth section, which forbids the charging or receiving greater compensation in the aggregate for the transportation of like kinds of property for a shorter than for a longer distance over the same line, under substantially similar circumstances and conditions, does not define or describe in what the similarity or dissimilarity of circumstances and conditions shall consist, it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice or preference, or whether the circumstances and conditions of the carriage have been substantially similar or otherwise, are questions of fact depending on the matters proved in each case. . . .

Coming at last to the questions of fact in this case, we encounter a large amount of conflicting evidence. It seems undeniable as the effect of the evidence on both sides, that an actual dissimilarity of circumstances and conditions exists between the cities concerned, both as respects the volume of their respective trade and the competition, affecting rates, occasioned by rival routes by land and water. Indeed, the Commission itself recognized such a state of facts by making an

allowance in the rates prescribed, for dissimilarity resulting from competition, and it was contended on behalf of the Commission, both in the courts below and in this court, that the competition did not justify the discriminations against Troy to the *extent* shown, and that the allowance made therefor by the Commission was a *due* allowance.

The issue is thus restricted to the question of the preponderance of the evidence on the respective sides of the controversy. We have read the evidence disclosed by the record, and have endeavored to weigh it with the aid of able and elaborate discussions by the respective counsel.

No useful purpose would be served by an attempt to formally state and analyze the evidence, but the result is that we are not convinced that the courts below erred in their estimate of the evidence, and that we perceive no error in the principles of law on which they proceeded in the application of the evidence.

The decree of the Circuit Court of Appeals is accordingly affirmed.

MR. JUSTICE HARLAN dissenting:

I dissent from the opinion and judgment in this case. Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that Commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce. The Commission was established to protect the public against the improper practices of transportation companies engaged in commerce among the several states. It has been left, it is true, with power to make reports, and to issue protests. But it has been shorn, by judicial interpretation, of authority to do anything of an effective character. It is denied many of the powers which, in my judgment, were intended to be conferred upon it. Besides, the acts of Congress are now so construed as to place communities on the lines of interstate commerce at the mercy of competing railroad companies engaged in such commerce. The judgment in this case, if I do not misapprehend its scope and effect, proceeds upon the ground that railroad companies, when competitors for interstate business at certain points, may, in order to secure traffic for and at those points, establish rates that will enable them to accomplish that result, although such rates may discriminate against intermediate points. Under such an interpretation of the statutes in question, they may

well be regarded as recognizing the authority of competing railroad companies engaged in interstate commerce — when their interests will be subserved thereby — to build up favored centers of population at the expense of the business of the country at large. I cannot believe that Congress intended any such result, nor do I think that its enactments, properly interpreted, would lead to such a result.

QUESTIONS

1. What powers, under Section 4, did the Interstate Commerce Commission consider given to it before the decision above?

2. How would the phrase “under substantially similar circumstances and conditions” ordinarily be defined?

3. Point out the difference between the Commission’s definition of the phrase in Question 2 and the court’s definition of it.

4. On whom was the original decision as to the similarity of conditions to rest?

5. As far as Section 4 is concerned, is Judge Harlan’s complaint justified?

6. Railroads entering Chicago urge that the World’s Fair, to be held in that city, is a case of an exceptional nature justifying relief from the operation of Section 4. Decide.

7. Before 1897 a United States railroad subject to the competition of the Canadian Pacific applied to the Interstate Commerce Commission for relief from the long-and-short-haul provision. What was the Commission’s decision?

8. Two carriers have lines between A and B. Is one of the carriers justified in making a lower charge from A to B than from an intermediate point to B on the basis of that fact alone?

9. A group of carriers serve X and Y, the latter being the more distant from another common point, A. Competition at X is stifled by agreement, whereas there is free competition at Y. Rates to Y are therefore lower than those from A to X. The claim is made by X that this is a violation of Section 4. Decide.

10. A carrier in 1900 was subject to actual competition in rates from other carriers subject to the Interstate Commerce Act. Without securing the consent of the Interstate Commerce Commission it adjusted its rates so as to make a lower charge for a longer distance. Was this a violation of the long-and-short-haul section of the act?

11. In 1903 a crop failure occurred in a section of the Middle West. A carrier serving that section at once lowered its rates in such a way as to violate the long-and-short-haul principle. Objection is made that, in spite of the humanitarian motives involved, this is a violation of the act. Decide.

12. A carrier from point A to point B charges a smaller rate than from A to C, being situated between A and B. Competition exists between A and B, and the rate charged between those points is nonremunerative. C attacks the rate. Decide.

2. MANN-ELKINS ACT

[A¹]

SECTION 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Interstate Commerce Commission, such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section. Provided, further, That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

¹ Section 4 of the Interstate Commerce Act, as amended by the act of June 18, 1910, c. 309, 36 Stat. at L. 539.

[B]

Intermountain Rate Cases

United States Supreme Court (1914), 234 U.S. 476

MR. CHIEF JUSTICE WHITE delivered the opinion of the court :

We shall seek to confine our statement to matters which are essential to the decision of the case. The provisions of section four of the Act to Regulate Commerce dealing with what is known as the long and short haul clause, the power of carriers because of dissimilarity of circumstances and conditions to deviate from the exactions of such clause, and the authority of the Interstate Commerce Commission in relation to such subjects, were materially amended by the act of June 18, 1910. Following the form prescribed by the Commission after the amendment in question, the seventeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of amended commerce act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points, and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast, and from the Pacific coast to the Atlantic seaboard, and to and from interior points lower than rates concurrently in effect from and to intermediate points. It was stated in the petition :

This application is based upon the desire of the interested carriers to continue the present method of making rates lower at the more distant points than at the intermediate points; such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Pacific coast ports to Atlantic seaboard ports; competition of various water carriers operating to foreign countries from Pacific coast ports; and competition of the products of foreign countries with the products of the Pacific coast; competition of the products of Pacific coast territory with the products of other sections of the country; competition of Canadian rail carriers not subject to the Interstate Commerce Act; competition of the products of Canada moving by Canadian carriers with the products of the United States; rates established via the shorter or more direct routes, but applied also via the longer or more circuitous routes.

After full hearing the Commission refused to grant unqualifiedly the prayer of the petition, but entered an order permitting in some respects a charge of a lower rate for the longer haul to the Pacific coast than was asked for intermediate points provided a proportionate relation was maintained between the lower rate for the longer haul to the Pacific coast and the higher rate to the intermediate points, the proportion to be upon the basis of percentages which were fixed. For the purposes of the order in question the Commission in substance adopted a division of the entire territory into separate zones, which division had been resorted to by the carriers for the purposes of the establishment of the rates in relation to which the petition was filed. Refusing to comply with this order the carriers commenced proceedings in the commerce court praying a decree enjoining the enforcement of the fourth section as amended on the ground of its repugnancy to the Constitution of the United States, and of the order as being in any event violative of the amended section as properly construed. An interlocutory injunction was ordered. The defendants moved to dismiss, and, on the overruling of the motions, appealed from the interlocutory order, the case being No. 136. Subsequently, upon the election of the defendants to plead no further, a final decree was entered and appealed from, that appeal being No. 162.

It suffices at this moment to say that all the contentions which the assignments of error involve and every argument advanced to refute such contentions, including every argument urged to uphold, on the one hand, or to overthrow on the other, the action of the Commission, as well as every reason relied upon to challenge the action of the court or to sustain its judgment, are all reducible to the following propositions:

(a) The absolute want of power of the court below to deal with the subject involved in the complaint because controversies concerning the fourth section of the Act to Regulate Commerce of the nature here presented were, by an express statutory provision, excluded from the cognizance of the court below. (b) That even if this be not the case, the action of the Commission which was complained of was purely negative, and therefore not within the cognizance of the court, because not inherently justiciable. (c) That, correctly interpreting the fourth section, the order made by the Commission was absolutely void because wholly beyond the scope of any power conferred by the fourth section as amended. (d) That even if, in some respects, the order of the Commission was within the reach of its statutory power,

there was intermingled in the order such an exertion of authority not delegated as to cause the whole order to be void. (e) That the order of the Commission was void even if the fourth section be interpreted as conferring the authority which the Commission exerted, since, under that assumption, the fourth section as amended was repugnant to the Constitution.

All the propositions, even including the jurisdictional ones, are concerned with and depend upon the construction of the fourth section as amended, and we proceed to consider and pass upon that subject and every other question in the case under four separate headings: (1) the meaning of the statute; (2) its constitutionality; (3) the jurisdiction of the court; (4) the validity of the order in the light of the statute as interpreted.

1. *The meaning of the statute.* . . .

Before considering the amended text we state briefly some of the more important requirements of the section before amendment and the underlying conceptions of private right, of public duty and policy which it embodies, because to do so will go a long way to remove any doubt as to the amended text, and will moreover serve to demonstrate the intent of the legislative mind in enacting the amendment.

Almost immediately after the adoption of the Act to Regulate Commerce in 1887 the Interstate Commerce Commission, in considering the meaning of the law and the scope of the duties imposed on the Commission in enforcing it, reached the conclusion that the words "under substantially similar circumstances and conditions" of the fourth section dominated the long and short haul clause and empowered carriers to primarily determine the existence of the required dissimilarity of circumstances and conditions, and consequently to exact in the event of such difference a lesser charge for the longer than was exacted for the shorter haul, and that competition which materially affected the rate of carriage to a particular point was a dissimilar circumstance and condition within the meaning of the act. We say primarily, because of course it was further recognized that the authority existing in carriers to the end just stated was subject to the supervision and control of the Interstate Commerce Commission in the exertion of the powers conferred upon it by the statute, and especially in view of the authority stated in the fourth section. In considering the act comprehensively it was pointed out that the generic provisions against preference and discrimination expressed in the second and third sections of the act were all-embracing, and were

therefore operative upon the fourth section as well as upon all other provisions of the act. But it was pointed out that where, within the purview of the fourth section, it had lawfully resulted that the lesser rate was charged for a longer than was exacted for a shorter haul, such exaction, being authorized, could not be a preference or discrimination and therefore illegal. *Re Louisville & N. R. Co.*, 1 I. C. C. Rep. 31. These comprehensive views announced at the inception as a matter of administrative construction were subsequently sustained by many decisions of this court. . . . We observe, moreover, that in addition it came to be settled that where competitive conditions authorized carriers to lower their rates to a particular place, the right to meet the competition by lowering rates to such place was not confined to shipments made from the point of origin of the competition, but empowered all carriers, in the interest of freedom of commerce and to afford enlarged opportunity to shippers, to accept, if they chose to do so, shipments to such competitive points at lower rates than their general tariff rates: a right which came aptly to be described as "market competition" because the practice served to enlarge markets and develop the freedom of traffic and intercourse. It is to be observed, however, that the right thus conceded was not absolute, because its exercise was only permitted provided the rates were not so lowered as to be nonremunerative, and thereby cast an unnecessary burden upon other shippers. *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U.S. 1. As the statute as thus construed imposed no obligation to carry to the competitive point at a rate which was less than a reasonable one, it is obvious that the statute regarded the rights of private ownership, and sought to impose no duty conflicting therewith. It is also equally clear that in permitting the carrier to judge primarily of the competitive conditions, and to meet them at election, the statute lodged in the carrier the right to exercise a primary judgment concerning a matter of public concern broader than the mere question of the duty of a carrier to carry for a reasonable rate on the one hand, and of the right of the shipper, on the other, to compel carriage at such rate, since the power of primary judgment which the statute conferred concerned in a broad sense the general public interest with reference to both persons and places,—considerations all of which, therefore, in their ultimate aspects, came within the competency of legislative regulation. It was apparent that the power thus conferred was primary, not absolute, since its exertion by the carrier was made by the statute the sub-

ject both of administrative control and ultimate judicial review. And the establishment of such control in and of itself serves to make manifest the public nature of the attributes conferred upon the carrier by the original fourth section. Indeed, that in so far as the statute empowered the carrier to judge as to the dissimilarity of circumstances and conditions for the purpose of relief from the long and short haul clause, it but gave the carrier the power to exert a judgment as to things public, was long since pointed out by this court. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 218.

With the light afforded by the statements just made we come to consider the amendment. It is certain that the fundamental change which it makes is the omission of the substantially similar circumstances and conditions clause, thereby leaving the long and short haul clause in a sense unqualified except in so far as the section gives the right to the carrier to apply to the Commission for authority "to charge less for longer than for shorter distances for the transportation of persons or property," and gives the Commission authority from time to time "to prescribe the extent to which such designated common carrier may be relieved from the operation of this section." From the failure to insert any word in the amendment tending to exclude the operation of competition as adequate under proper circumstances to justify the awarding of relief from the long and short haul clause, and there being nothing which minimizes or changes the application of the preference and discrimination clauses of the second and third sections, it follows that in substance the amendment intrinsically states no new rule or principle, but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the Commission as a primary instead of a reviewing function. In other words, the elements of judgment, or, so to speak, the system of law by which judgment is to be controlled, remains unchanged, but a different tribunal is created for the enforcement of the existing law. This being true, as we think it plainly is, the situation under the amendment is this: Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so, in the absence of some authority, would not only be inimical to the provision of the fourth section, but would be in conflict with the preference and discrimination clauses of the second and third sections. But while the public power, so to speak, previously lodged in the carrier, is thus withdrawn and reposed in the Commis-

sion, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, and, if not, is, in any event, by necessary implication, granted. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the second and third sections.

2. *The alleged repugnancy of the section as amended to the Constitution.*

But if the amendment has this meaning, it is insisted that it is repugnant to the Constitution for various reasons which, superficially considered, seem to be distinct, but which really are all so interwoven that we consider and dispose of them as one. The argument is that the statute, as correctly construed, is but a delegation to the Commission of legislative power which Congress was incompetent to make. But the contention is without merit. . . .

The mere statement of the contention, in the light of its environment, suffices to destroy it. How can it otherwise be since the argument as applied to the case before us is this: that the authority in question was validly delegated so long as it was lodged in carriers, but ceased to be susceptible of delegation the instant it was taken from the carriers for the purpose of being lodged in a public administrative body? Indeed, when it is considered that, in last analysis, the argument is advanced to sustain the right of carriers to exert the public power which it is insisted is not susceptible of delegation, it is apparent that the contention is self-contradictory, since it reduces itself to an effort to sustain the right to delegate a power by contending that the power is not capable of being delegated. . . .

Accurately testing this final result of the argument it is clear that it exclusively rests upon convictions concerning the impolicy of having taken from carriers, intimately and practically acquainted as they are with the complex factors entering into rate making and moreover impelled to equality of treatment as they must be by the law of self-interest operating upon them as a necessary result of the economic forces to which they are subjected, and having lodged the power in an official administrative body which, in the nature of things, must act, however conscientiously, from conceptions based upon a more theo-

retical and less practical point of view. But this does not involve a grievance based upon this construction of application of the fourth section as amended, but upon the wisdom of the legislative judgment which was brought into play in adopting the amendment,—a subject with which we have nothing in the world to do. It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission in a proper case to refuse an application, therefore the law is void because in such a contingency the statute would amount to an imperative enforcement of the long and short haul clause and would be repugnant to the Constitution. . . . The contention by necessary implication assails the numerous cases which, from the enactment of the Act to Regulate Commerce down to the present time, have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short haul clause. . . .

3. *The jurisdiction of the court. . . .*

[The court in the portion of the text that follows affirms the jurisdiction of the commerce court by argument not especially pertinent to the subject under consideration.]

4. *The validity of the order in the light of the statute as interpreted. . . .*

The main insistence is that there was no power after recognizing the existence of competition and the right to charge a lesser rate to the competitive point than to intermediate points to do more than fix a reasonable rate to the intermediate points; that is to say, that under the power transferred to it by the section as amended, the Commission was limited to ascertaining the existence of competition, and to authorizing the carrier to meet it, without any authority to do more than exercise its general powers concerning the reasonableness of rates at all points. But this proposition is directly in conflict with the statute as we have construed it, and with the plain purpose and intent manifested by its enactment. To uphold the proposition it would be necessary to say that the powers which were essential to the vivification and beneficial realization of the authority transferred had evaporated in the process of transfer, and hence that the power perished as the result of the act by which it was conferred. As the prime object of the transfer was to vest the Commission, within the scope of the discretion imposed, and subject, in the nature of things, to the limitations arising from the character of the duty exacted and flowing from the other provisions of the act, with authority to consider competitive condi-

tions and their relation to persons and places, necessarily there went with the power the right to do that by which alone it could be exerted, and therefore a consideration of the one and the other, and the establishment of the basis by percentages was within the power granted. . . . As we have pointed out, though somewhat modified, the zones . . . selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate-making which was included in the tariffs which were under investigation, and therefore we may put that subject out of view. Indeed, except as to questions of power, there is no contention in the argument as to the inequality of the zones or percentages, or as to any undue preference or discrimination resulting from the action taken. But be this as it may, in view of the findings of the Commission as to the system of rates prevailing in the tariffs which were before it, of the inequalities and burdens engendered by such system of the possible aggrandizement unnaturally beyond the limits produced by competition in favor of the competitive points and against other points by the tariff in question, — facts which we accept, and which indeed are unchallenged, — we see no ground for saying that the order was not sustained by the facts upon which it was based, or that it exceeded the powers which the statute conferred, or transcended the limits of the sound legal discretion which it lodged in the Commission when acting upon the subject before it.

It results that the Commerce Court, in enjoining the order of the Commission, was wrong, and its decree to that end must therefore be reversed, and the case be remanded to the proper district court, with directions to dismiss the bill for want of equity.

Reversed.

QUESTIONS

1. What are the important differences between Section 4 of the original act and the same section as amended in 1910?
2. What effect do these differences have on the power of the Interstate Commerce Commission?
3. What must be the procedure when a carrier wishes to make a lower rate for the longer distance than for the shorter one?
4. On which party to a case is the weight of the evidence to rest — on the carrier or on the Commission?
5. Upon what considerations did the court rest its decision to grant permission to the carriers to charge a lower rate to Pacific-coast points?

6. Texas-coast points shipping tropical fruit to certain points east of the Missouri River request relief from Section 4 in order to meet the competition of rail lines from New Orleans. Has the Interstate Commerce Commission power to grant such permission? Is the case one where such relief should be granted?

7. Two carriers run between A and B. The distance by the first is 400 miles; by the second, 500 miles. The second asks relief from the long and short haul section in order that it may carry some of the large volume of traffic which moves between A and B and still not have to carry small amounts of intermediate traffic at a low rate. Decide. If the distance via the second carrier had been 425 miles, would the decision have been different?

8. A reduction in rates from Pittsburgh to Seattle is made under authority of an order based on Section 4. Water competition is temporarily prevented by slides in the Panama Canal. The carriers file an increased rate from Pittsburgh to Seattle, and the Commission consents to it. Is such an increase lawful?

9. The rate in 1911 on sugar from New Orleans to Detroit was 23 cents, and from New Orleans to Battle Creek, Michigan, 27 cents. The complainant urges that this is a violation of the Act to Regulate Commerce. Decide.

10. Because of water competition the rates on knit goods from eastern points to Chicago were reduced in 1896. The particular water competition disappeared, and in 1914 the carriers applied for permission to increase these rates. What would be the decision? If the reduction had been made in 1911, would the situation have been changed?

11. Carriers are given permission to establish lower rates on some commodities from Missouri River territory to Pacific-coast terminals than to intermediate points. On what ground could such permission rest?

12. Certain through rates from St. Louis and other points to Texas common points exceed the aggregates of the intermediate rates to and from Shreveport, Louisiana. The carriers concerned apply for permission under Section 4 to continue these through rates, alleging that a readjustment would cause great confusion in a rate system which had existed for a long time. Decide. If water competition had affected the intermediate rates, would the decision be changed?

13. The rate on iron and steel articles from Pittsburgh to New York is 16.9 cents. The normal rate by water from New York to Pacific-coast points is 40 cents. Rail carriers apply for permission under Section 4 to make an all-rail rate of 55 cents on these articles from Pittsburgh to the Pacific-coast points. Decide.

14. A carrier charges 15 cents per 100 pounds on copper wire from Dollar Bay, Michigan, when navigation on the Great Lakes is open, and 22 cents during the months when it is closed. Is this a violation of Section 4?

3. ACT OF 1920

[A]

[The pertinent statutory provisions are found in Section 4 of the Interstate Commerce Act (I. C. Act, pp. 16-17).]

[B]

Transcontinental Rate Cases of 1922

Interstate Commerce Commission (1922), 74 I. C. C. 48

BY THE COMMISSION :

These proceedings comprise fourth-section applications of the transcontinental lines proposing to establish from and to the Pacific-coast terminals lower rates than are in effect to and from intermediate points on traffic having origin or destination in the so-called defined territories lying, roughly speaking, east of the Rocky Mountains. The Pacific-coast terminals in question are ports of call in California, Oregon, Washington, and British Columbia for steamships plying between those ports, on the one hand, and Atlantic and Gulf ports, on the other, through the Panama Canal. The intermediate territory, hereinafter referred to as intermountain territory, embraces such typical points as Spokane (Washington), Reno (Nevada), Salt Lake City (Utah), and Phoenix (Arizona). On many commodities the intermediate territory extends east of Helena (Montana), Denver (Colorado), Albuquerque (New Mexico), and El Paso (Texas).

The proposed reduced rates are grounded on the low rates by steamship lines between the Atlantic and Gulf ports and the Pacific ports, and the movement of a substantial volume of traffic thereunder.

Except as otherwise noted, the rates of the applicant carriers are the same over all routes, and apply not only all rail, but, so far as New York City is concerned, also in connection with the Southern Pacific Company's steamship line operating between that point and New Orleans (Louisiana), and Galveston (Texas). For convenience, the rates of the applicant carriers will be referred to as the rail rates and the applicants as the rail lines. The steamship companies will be referred to as the water lines, and their rates or those applying in connection therewith, plus the incidental charges hereinafter explained, will be referred to as the water charges. All rates and charges are stated in cents per 100 pounds, except as otherwise noted. They do not include the general reductions of 1922.

The General West-bound Application

Fourth Section Application No. 12063

This application proposes the establishment of reduced rates to the Pacific-coast terminals on various commodities from all points in the defined territories.

Applications covering this same general traffic have been made at various times in the past, and the maintenance of lower rates to the terminals than to intermediate points was generally permitted until March 15, 1918. Railroad Commission of Nevada *v.* S. P. Co., 21 I. C. C. 329; City of Spokane *v.* N. P. Ry. Co., 21 I. C. C. 400; Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611; 34 I. C. C. 13, and other cases. On the above date all departures from the long and short haul rule in west-bound transcontinental rates were removed under the decisions in Reopening Fourth Section Applications, 40 I. C. C. 35, and Transcontinental Rates, 46 I. C. C. 236. It was there found that due to the withdrawal of ships for use in the transatlantic service water competition between the Atlantic and Pacific ports was no longer a compelling force; and we found that the maintenance of lower rates to the coast than to intermediate points unduly preferred the coast. We denied relief from the long and short haul rule, and expressed the view that the commodity rates in certain instances at least might be graded, as the class rates had been; that is, made lower to the intermediate points than to the terminals. The rates on certain high-grade traffic, including such articles as pianos and rubber tires, were graded; but, generally speaking, the rates to the terminals were increased to the extent necessary to put the terminals on a parity with the intermediate points, resulting in a blanket extending several hundred miles inland from the Pacific coast. This adjustment was approved in Transcontinental Commodity Rates, 48 I. C. C. 79. It was subjected to the general increases of 1918 and 1920, and the general reduction of 1922, but otherwise has remained substantially unchanged up to this time.

The failure of the carriers to grade more of their rates brought forth a complaint for intermountain territory which alleged that the rates to these points were unreasonable, and unduly prejudicial as compared with the rates to the terminals. We found that the rates, in general, were not unreasonable or unduly prejudicial and dismissed the complaint. Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226, March 29, 1921. We held that there was some water competition

and expressed the view that strong water competition was likely to be resumed within a short time.

A few months later, in August, 1921, this application was filed. Hearings were had at various points throughout the country during November, December, and January following. The record shows that for some time previous to the hearings traffic destined to the Pacific coast had been moving by water in heavy volume. Competition was keener and the water service more efficient than at any time before the war. The rail lines and the water lines, respectively, upon request furnished statements of the tonnage moved from the defined territories to the Pacific coast during June, July, and August, 1921. These statements show that considerably more than half the traffic in most all of the commodities involved was shipped by water. As to some commodities the movement was nearly all by water. All but a small portion of the water-borne traffic originated in and east of Buffalo-Pittsburgh territory, indicating that the Pacific-coast interests are making their purchases in that part of the East which is tributary to the water lines and from which they can secure low rates. The movement by water may be relatively greater now than it was during the period of the hearings, for the water service was then only beginning to develop on a large scale. . . .

[The] lines operated in this service over seventy-five steamships, and the number of steamships was increasing. Most of them plied from the North Atlantic ports. Several of the stronger lines maintained regular sailing schedules, the ships departing whether fully loaded or not. Sailings from the North Atlantic ports were at least three or four per week. Two of the lines, the Luckenbach and the Pacific Caribbean Gulf Line, maintained service from the Gulf ports. They had a total of about a dozen ships in this latter service. The sailings were not as regular as from the North Atlantic ports, the ships staying in port until they obtained full cargoes. Sailings averaged about three per month.

Most of the ships were of first-class construction, modern in every respect, and afforded efficient service. Many of them were designed especially for handling coast-to-coast business. The sailing time of the best ships between New York and San Francisco, California, ranged from about eighteen to twenty-one days. However, from and to the northern ports, for instance, from Boston, Massachusetts, to Vancouver, British Columbia, the sailing time was longer, as stops of several days were made at other ports en route.

Comparatively little of this water-borne traffic originated at the ports. It generally moved via the North Atlantic ports. The small portion which moved from the points west of the Buffalo-Pittsburgh district went either to the North Atlantic ports or to the Gulf ports for transshipment. The traffic via the Gulf was not heavy. The Gulf lines depended mainly on iron and steel from the Birmingham, Alabama, district and on commodities produced near the Gulf, such as rosin and turpentine. They drew comparatively little traffic from the North and Middle West. Some of that traffic moved by rail to St. Louis, Missouri, or Cairo, Illinois, and thence by the barges of the Mississippi-Warrior Service, operated by the War Department, to New Orleans. This line operated excellent steel barges, and, on the south-bound movement particularly, drifting with the current, made fairly good time, averaging about nine days to New Orleans. Sailings from Cairo, the winter port, were at the rate of about two per week, each consisting of a fleet of six barges. This line is used mainly for heavy commodities. Its traffic destined to the Pacific coast has been rather light. During the fifteen months' period from October, 1920, to December, 1921, inclusive, there were only about 100 carloads, principally canned goods, starch, and iron and steel from Illinois points and St. Louis.

At the time the application was filed all traffic from interior points that was shipped by the water lines was charged local rates to the ports. Effective February 15, 1922, the lines from Chicago, Illinois, and related points, principally in Illinois, proposed proportional rates to the Gulf ports for application on traffic destined to the Pacific coast through the Panama Canal, equal to the local rates from Chicago to New York City. The obvious purpose was to put the Gulf ports on a rate parity with the North Atlantic ports as to traffic to the Pacific coast. These rates were originally suspended by us, but were permitted to become effective April 1, 1922. The Mississippi-Warrior Service maintains lower rates than the all-rail lines to the Gulf, the differential from all points being 20 per cent of the St. Louis-New Orleans rail rate. This line also publishes joint through all-water rates from St. Louis and Memphis, Tennessee, to the Pacific coast via New Orleans and the steamship lines. Rates from Chicago and points in the Middle West over this route generally are made on the basis of rail rates to St. Louis and the water charges beyond, or on the basis of the proportionals to New Orleans plus the water charges beyond....

The rail lines contend that the proposed rates are no lower than are necessary to yield them a fair share of the business. A fair share of the business seems to be regarded as such an amount thereof as can be secured under equality of opportunity. Equality of opportunity may be defined as such an adjustment of rates as would cause a business man, under ordinary circumstances, to reach the conclusion after considering service and rates that he would ordinarily be as willing to send traffic by water as by rail, or vice versa.

The commodities here considered are not the only ones as to which there is substantial competition with the water lines. It was the declared purpose of the carriers to be conservative, and not to meet water competition except where it is a matter of serious concern, and then only within reasonable limits. If the competition further develops, the rail lines plan from time to time to seek relief on additional commodities. The present application covers only carload traffic, but later applications may be filed to include some that is less than carload. It was said that if the steamship lines reduce their rates, as in fact they have since done, the rail carriers may seek authority to meet the situation thus created.

None of the proposed rates meet even approximately the coast-to-coast rates of the water lines. They are not generally intended or expected to draw or to hold any large amount of the port-to-port traffic to the rail lines. They did, however, at the time of the hearing, approximate the charges available from certain interior points to the Pacific-coast terminals by rail to the Atlantic and Gulf ports and hence by water, plus such incidental charges as marine insurance and unloading and transfer charges at Pacific-coast terminals.

In determining the rate to be applied on each commodity the carriers generally selected the interior point or points at which the competitive traffic originates in largest volume, and from which the local rate to the Atlantic seaboard was, in their opinion, high enough when taken in connection with the port-to-port water rate and incidental charges, to constitute the basis for arriving at a reasonably compensatory all-rail rate. For instance, the rate proposed from all points on iron and steel approximated the rate from Pittsburgh, Pennsylvania, to the Pacific coast via Baltimore, Maryland, rail and water, plus a few cents to represent the superiority of the rail service. It was not intended to meet the competitive situation at the North Atlantic ports, as the port-to-port water rate was so low as to make that impossible. In determining the rate on each of the commodities considered there were

added generally a few cents to the basic figure. The rate arrived at, according to the above method, was, as a rule, proposed from all points in the defined territories to the Pacific-coast terminals. It was blanketed to apply from all points east of the rate-fixing point in order to accommodate those who, for some special or emergency reason, preferred to pay a substantially higher all-rail rate than is available in connection with the water lines. It was blanketed to apply from points west of the rate-fixing point in order to keep all parties in position to do business in competition with those who could use the water routes to advantage. Ordinarily a given commodity is produced at many points in the defined territories, and a buyer on the Pacific coast is not likely to purchase in the Middle West if he can get the same article in the East at about the same price and at a much lower freight rate. The blanketing of points of origin, it was hoped, would induce the movement of traffic from the Middle West and afford the carriers the same kind of traffic, with the same gross revenues for the shorter haul, as they would receive for the longer haul from the points farther east. In other words, the lines west of Chicago would rather move traffic from Chicago than from Pittsburgh, for they would thus avoid a division of the rate with their Eastern connections. If they should publish a higher rate from Chicago than from Pittsburgh because the rail-and-ocean rate from Chicago was higher than from Pittsburgh, not much of the traffic would originate at Chicago. The Eastern points would presumably do the lion's share of the business, shipping either by the water lines or all rail, the former route depriving the Western lines of the traffic, and the latter necessitating several hundred miles more of rail haul than if the traffic moves all rail from Chicago. In a few instances it is attempted to justify this blanketing arrangement by the fact that traffic can be shipped from Chicago, Birmingham, Alabama, and the Middle West in general, via the Gulf ports, at through rates to the Pacific coast that approximate the rates via Atlantic ports from producing points farther east, such as Pittsburgh and Cincinnati, Ohio. Keeping the Middle West on a rate parity with the East is alleged to be wholesome in its economic effects, in that it tends to distribute manufacturing industry and avoid its concentration in the East. Stated otherwise, it tends to prevent the exclusive development of the country within range of the seaboard to the disadvantage of the interior. The lines west of Chicago might be inclined to provide lower rates from the Middle West than from seaboard territory, in order to develop points of origin on their own lines, but they might thus lose

traffic from points east. Moreover, it seems to be the policy of the Southern Pacific Company, with its steamship line reaching New York City, to keep that point on a parity with the Middle West. This has tended to blanket points of origin. It may be noted that subsequent to the hearings the Southern Pacific published on a number of commodities reduced rates from its New York piers to Pacific-coast terminals, which conform to the long and short haul rule. They are now under suspension in Investigation and Suspension Docket No. 1511, Reduced Rates from New York Piers. Five of these commodities, namely, canned goods, linoleum, coffee, paints, and cordage, are included in this application, which asks authority to establish over all routes still lower rates to the terminals only.

The carriers are not disposed to blanket their rates to points of destination, and therefore make application for relief from the long and short haul rule. They state that to blanket the proposed rates to destinations might mean for them loss of net revenue greater than the profit that would be obtained from the proposed rates to the terminals. The rail lines contend that to points of destination there is not so much opportunity for shortening the haul as there is with reference to points of origin. The position of the carriers seems to be that Chicago and points in that part of the country can produce all the manufactured articles that the Pacific coast and intermountain territory consume, and that the movement from the Middle West as well as from the seaboard should be encouraged because it is in the interest of the carriers, while on the other hand the intermountain territory cannot consume, or its jobbers reasonably or economically distribute, all the traffic that now goes to the Pacific coast. In other words, the carriers seemingly feel that comparatively little could be accomplished in the way of shortening the haul by affording interior points such as Spokane, Reno, and Phoenix the same rates as the coast, because the capacity of these points for consumption and distribution is limited. The territory tributary to them is rather sparsely settled. Apparently, the carriers' view is that it is not possible by freight rates materially to increase consumption at these points nor materially to develop them as distributing points; and that no such adjustment of rates will make Spokane, Reno, and Phoenix the distributing centers for the more densely populated territory along the Pacific coast.

While on traffic to the Pacific coast it is proposed to keep the Middle West on a parity with seaboard territory, the latter would be required to pay more than the Middle West on traffic to intermountain

territory. In other words the present rates both to the terminals and to intermountain territory are graded as to territories of origin. For instance, the rates on structural steel to both regions of destination at the time of the hearing were \$1.175 from Colorado common points, \$1.255 from Missouri River, \$1.42 from Mississippi River, \$1.50 from Chicago, \$1.585 from Cincinnati, \$1.665 from Pittsburgh, and \$1.835 from the Atlantic seaboard. This grading arrangement would be left unchanged on traffic destined to intermountain territory, although on traffic destined to the terminals, as previously explained, it is proposed to blanket the rates over the whole territory of origin, affording the terminals a wider range of markets than afforded the intermediate points. The intermountain interests in order to draw traffic from the Atlantic seaboard must surmount an obstacle in the form of higher rates than from Chicago. To reduce the rates from the Middle West to the Pacific coast on account of the water rates from seaboard territory to the Pacific coast is in the interest of Western rail lines, but a reduction from seaboard territory to intermountain territory to meet the existing rail rates from the Middle West to intermountain territory would lengthen the haul on such traffic as moved from the seaboard region and not benefit the Western rail lines. In fact the applicants represent that if the rail lines should insist on hauling traffic from seaboard territory rather than from Chicago at an equality of rates they might lay themselves open to a charge of inefficient operation. As to intermountain territory, there is, it is alleged, no compelling reason for such a policy of rate-making. . . .

The Fourth Section as Amended

Where water competition is involved, the applicants contend that they demonstrate the propriety of relief from the long and short haul rule when they show that the competition by water is actual and compelling; that the rates proposed to meet the water competition, while less than they might otherwise be, are necessary if applicants are to secure an equitable share of the traffic; that the proposed rates yield some margin over the extra expense involved in taking on the additional traffic moving thereunder; and that the rates maintained to intermediate points are not unreasonable in themselves. Each of these positions, they contend, is demonstrated on the present record, taken in connection with our finding in *Intermediate Rate Asso. v. Director General*, *supra*, that the rates to intermediate points are not unreason-

able or unduly prejudicial. This showing, they aver, brings them squarely within the rules under which we administered the fourth section prior to the amendments of 1920. They further contend that the present wording of the fourth section, prohibiting us from granting relief where the charge to or from the more distant point is not reasonably compensatory for the service performed, does not in any wise invalidate the sufficiency of the showing which they here make. In short, they contend that if the proposed terminal rates are all they can get, and yield something in the way of net revenue, they are perforce reasonably compensatory.

This requirement of the amended fourth section that "in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed" has proved to be the crux of the issue presented as to meaning of the amended fourth section.

For the intermountain interests it is argued that a rate to be reasonably compensatory to the more distant terminal point must bear its full share of operating expenses, interest on funded debt, equipment and joint facility rents, taxes, and the percentage return fixed by us pursuant to Section 15a of the Interstate Commerce Act. In support of this interpretation various court decisions are cited defining the words "reasonably compensatory," or words that are said to be tantamount thereto.

We are unable to accept this interpretation of the phrase "reasonably compensatory." So interpreted, the long and short haul rule of the fourth section must become absolute or rigid from the very nature of the case. According to this version of "reasonably compensatory," the rate to the farther-distant point must yield its full share of the expense of utilizing the additional track mileage covered, as well as its full share of the additional expenses incident to the longer use of equipment required for the longer haul. There may be difficulty in discovering to a nicety the exact legislative intent in the amended fourth section. But the rejection of an absolute long and short haul clause by both Houses of Congress is inconsistent with any construction of the phrase in question which would be equivalent in effect to an absolute clause.

A similar but less extreme interpretation of the words "reasonably compensatory" is urged on behalf of various state commissions in the intermountain territory. It is pointed out that there is a margin

between a rate which barely escapes being confiscatory and the highest rate which a regulating body may lawfully allow. To the intermediate point a rate might approach the latter limit while a rate to a more distant point might conceivably be less and yet not so low as to be confiscatory. Seemingly, the rate to the more distant point may contribute something less than a full proportionate share of return upon investment and thus theoretically be less than a greater rate to an intermediate point. This version of "reasonably compensatory" seems to agree with the former interpretation in that both require that the rate to the more distant point must pay its full share of all operating expenses, but is more elastic in not requiring that it must contribute its full share to the return designated as profit. Both interpretations appear to hold in common that a "reasonably compensatory" rate cannot be less than a rate which, if imposed by a regulatory tribunal, would be adjudged nonconfiscatory.

We are unable to accept this interpretation of the words "reasonably compensatory" as used in the amended fourth section.

Where a rate imposed by a regulatory body is under judicial review upon the allegation that the rate fixed is confiscatory, it has been held by the courts that a rate may not lawfully be fixed by such tribunal which is based alone on the out-of-pocket costs ascribable to that particular traffic, but that to be lawful the rate must be sufficient to cover a ratable proportion of the average cost of freight traffic generally, including a return on the property devoted to public service. To hold otherwise would compel the performance of a certain specified kind of service by the carrier at less than average cost. The extension of this principle to other classes of traffic, if pursued far enough, would bankrupt the road.

Where, however, carriers voluntarily propose to reduce certain rates to an out-of-pocket *plus* basis in order to augment the total traffic carried, a wholly different situation is presented. The menace of confiscation is absent, for *volenti non fit injuria*; and the additional traffic, if secured with a resulting augmentation of net revenue instead of laying a burden upon other traffic, affords the possibility of lightening the burden thereon by bringing a greater tonnage under contribution to net revenue.

The criteria of a reasonably compensatory rate in a confiscation case are therefore essentially distinct from the criteria of a reasonably compensatory rate where carriers volunteer a reduction on certain rates to an out-of-pocket *plus* basis. In the first set of cases the carrier

has presumably been charged with seeking to extract from the public which is served more than the services are reasonably worth; in the second set of cases the carrier is accused by protestants, not primarily of seeking to extort more than the service is reasonably worth to those who receive the service but of working undue discrimination as between those who can and those who cannot avail themselves of the lower rates voluntarily proposed.

The criterion of a reasonably compensatory rate suggested by the carriers has been indicated above. It is summarized in the formula "out-of-pocket-expenses-plus-some-profit."

Just as we have rejected the two interpretations of "reasonably compensatory," suggested by the protestants as too narrow, so we are disposed to reject the single criterion suggested by the carriers in the above formula as insufficient, standing alone. It is probably true that this formula was deemed by us as adequate in disposing of fourth-section applications prior to the amendments of the fourth section in the Transportation Act, 1920, Fourth Section Violations in the Southeast, 30 I. C. C. 153. We do not agree with the carriers that the fourth section has not been changed in substance. The amendment has made mandatory what theretofore rested in our sound discretion as to compensation for the service performed to the more distant point, as to circuitry, and as to potential water competition. Moreover, in Section 500 of the Transportation Act, 1920, is expressly declared the policy of Congress to foster and preserve in full vigor both rail and water transportation. We think the amendment was the Congress's way of saying that we should follow a less liberal policy in dealing with departures from the long and short haul rule than had been followed in former years. Our administrative power at this time is in some respects narrower than before the amendment. The fourth section, as amended, requires the observance by us of certain administrative rules which we were enforcing prior to the amendment, but which in some measure lay within our sound discretion to modify or change. We are also required now to accord due observance to Section 500 of the Transportation Act, 1920, which indicates the purpose of Congress "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Moreover, the requirements of Section 15a may not be defeated or jeopardized by the action of particular rail carriers seeking to augment their own net earnings, irrespective of the effect of rate changes

adverse to the carriers of the country generally, or of a large territorial group. Trunk Line and Ex-Lake Iron Ore Rates, 69 I. C. C. 589. It clearly would defeat the intent of Congress to foster transportation by rail and water in full vigor if the rail carriers were permitted, at practically little or no profit to themselves, to operate so as to deprive water carriers of traffic which the water carriers would naturally handle. Moreover, it must be borne in mind that where the out-of-pocket theory is used as a rate basis, there is inevitably thrown upon the rest of the traffic the task of providing the bulk of the net return contemplated in Section 15a. Too wide an extension of the out-of-pocket theory would transpose the entire burden of producing dividends and interest and meeting other fixed charges upon only a part of the traffic carried.

In the light of these and similar considerations, we are of opinion and find that in the administration of the fourth section the words "reasonably compensatory" imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in Section 15a of the act. It may be added that rates of this character ought, wherever possible, to bear some relation to the value of the commodity carried and the value of the service rendered in connection therewith. We also find that where carriers apply for relief from the long and short haul clause of the fourth section and propose the application of rates which they designate as "reasonably compensatory," they should affirmatively show that the rates proposed conform to the criteria indicated above. It goes without saying that carriers should not propose rates or rate structures for approval in a fourth-section application which create infractions of other provisions of the Interstate Commerce Act, and particularly of Section 3.

The General West-bound Application

Statistical data were offered by the carriers to prove that the proposed rates to the terminals would be sufficient to pay something over and above the out-of-pocket costs.

On the basis of actual operating expenses of all Class I roads in the

256 GOVERNMENT AND RAILROAD TRANSPORTATION

United States for the year 1920, adjusted to the present wage scale, the carriers estimate the total operating expenses for 1921, and then take 75.22 per cent of that to represent the proportion of that chargeable to freight traffic. On the basis of 1920 freight traffic statistics, taken from our preliminary abstract, they then estimate the operating expense, or transportation cost, per car-mile for revenue freight in 1921 to be 27.113 cents. They estimate the cost of moving carload freight in the United States in 1921, per car and per 100 pounds, to have been as follows :

FOR TYPICAL HAUL OF	REPRESENTING THE APPROXIMATE DISTANCES BETWEEN	TOTAL COST PER CAR	COST PER 100 POUNDS
			<i>Cents</i>
3300 miles	Boston and Pacific coast	\$894.72	167.43
3000 miles	New York and Pacific coast	813.38	152.21
2700 miles	Pittsburgh and Pacific coast	732.04	136.99
2200 miles	Chicago and Pacific coast	596.48	111.62

These figures assume that it costs the same per car-mile to haul a car a long distance as it does a short distance. The average haul in 1920 was 326 miles, and since the cost of moving long-haul traffic is generally less per car than that of short-haul traffic the figures shown for the distances in the above table are believed by the carriers to be very liberal.

Since part of the traffic to be taken at the proposed rates is now moving by water and any business that would be drawn away from the water lines would therefore be added traffic for the rail lines, the carriers proceed to eliminate from the above estimated costs all costs except those incident to the handling of the added traffic. In other words, added traffic is regarded as not logically participating in all expenses. The determination of the cost chargeable to the added traffic is undertaken on two bases after assigning $33\frac{1}{3}$ per cent of the expense of maintenance of way and structures and 80 per cent of the expense of maintenance of equipment to the movement of traffic, the balance of the maintenance expenses being chargeable, according to experts, to the action of the elements.

Basis I proceeds on the theory that the added traffic would all be carried on trains not now running full and would therefore not entail added train-miles, while Basis II assumes that the added traffic would require pro rata added train-miles. Under Basis I the carriers arbitrarily assign to the cost of handling the added traffic certain percentage proportions of various items of expense and compute the ratio that

these proportions represent to the total transportation expenses. For instance, it is assumed that the expense of station employees is affected to the extent of 10 per cent by the added traffic and that the ratio that this added expense bears to the total transportation expense is 1.444 per cent. It is assumed that expenditures for train-locomotive fuel would be increased 50 per cent because of the additional loads, but nothing is charged for train enginemen, because the additional traffic, if handled in trains already moving, would not require additional train employees. The ratio that all of these items of expense bear to the total transportation expense is found to be 18.561 per cent. . . .

Rate Basis II proceeds along the same lines as rate Basis I, except that it includes expenses which are not included in rate Basis I. For instance, it assumes that the expense both of train-locomotive fuel and train enginemen would be increased by the added traffic to the extent of 100 per cent, and that the expense of yard conductors and brakemen would be affected by the added traffic to the extent of 50 per cent, this figure rather than 100 per cent being used on the theory that the long-haul traffic here involved requires much less switching at terminals than does traffic generally. The three expenses last named are shown as 18.129, 8.668, and 3.483 per cent, respectively, of the total transportation expenses. All the expenses shown as assignable to the added traffic under Basis II are 64.883 per cent of the total transportation expenses.

The carriers do not claim that either the figures arrived at under rate Basis I or under rate Basis II should be taken as reflecting the exact situation, but that the correct figure lies somewhere between the 18.561 per cent under Basis I and the 64.883 per cent under Basis II. It is stated that authorities on the subject regard about 50 per cent as the usual ratio for added traffic generally. Where the added traffic involves especially long hauls the ratio should be less. It is admitted by the carriers that additional train-miles will probably be necessary in some instances, but they claim that they will not have to add train-miles in the exact ratio to added traffic. In this connection there is some testimony from intermountain witnesses to the effect that it is the practice of carriers generally not to run trains without full load; that is, that trains are held until there is sufficient traffic to fill them. If this testimony be accepted as correct, it excludes Basis I from consideration. The carriers contend, however, that the proposed rates are still safely within costs, and that this is indicated by the final figures arrived at under Basis II.

The percentages arrived at under Bases I and II are each used to determine the proportion of the total operating expenses of all Class I roads for 1920 which could be chargeable to the added traffic. Based on statistics as to car-loading and tare weights the costs per car and per 100 pounds for handling the additional traffic are computed for the four distances above shown, (a) assuming a 25 per cent empty haul for cars of the kind necessary for this business, which percentage, they say, has been found through experience to be about correct; and (b) assuming no empty haul. These computations are made under both Bases I and II; that is, both on the theory that the added traffic would require additional train-miles and on the theory that it would not. These figures are for the average car; they are then used to determine the costs for carloads of different weights, namely, 40,000, 50,000, 60,000, and 80,000 pounds. . . .

As above indicated, these figures are based on 1920 returns, adjusted to 1921. A study was made by the carriers of the actual expenses during the first six months of 1921 and also for July, 1921, with but slightly different results.

The highest cost figures obtained are in almost every instance considerably below the earnings that would accrue from the proposed rates. Incidentally attention is called to the fact that the costs per car arrived at are much greater for a heavy carload than for a light carload, although it is usually contended that the costs of transporting a heavy carload do not greatly exceed the costs of transporting a light carload. It will be seen, for instance, that for a 3300-mile haul the cost under Basis I, assuming the 25 per cent empty movement, would be \$264.32 on a 40,000-pound carload, while for an 80,000-pound carload it would be \$373.65.

We are not prepared to accept this quantitative difference in costs. While the heavier load will entail somewhat heavier costs, we are not convinced that the variation in costs is as great as indicated in the carriers' showing above. When it is recalled that the revenue per car is the product of the load multiplied by the rate per 100 pounds, it will be readily seen that a 20,000-pound load will yield only one quarter of the revenue yielded by an 80,000-pound load where the rate per 100 pounds is the same. Even where the rate on the lighter load is double that on the heavier, the revenue yield of the light-loading car is but half of the heavier loaded car, whereas in the example cited the cost of the heavier car would be only about 40 per cent greater.

If we accept provisionally the carriers' estimate that the average cost per car for a 3000-mile haul is \$813.38 and the assumption that for added carloads of traffic the cost would be approximately half as much per car, or \$406.69, we should be justified in doubting whether a yield per car for a haul of 3000 miles that falls appreciably short of \$400, no matter how light the carload minimum, can yield much, if anything, over out-of-pocket cost.

In studying the minima in connection with the proposed blanketed rate to Pacific terminals, we cannot fail to pay close attention to the minimum as well as to the rate. Thus on iron and steel articles, with minima frequently as high as 80,000 pounds, the typical earnings from Pittsburgh to the Pacific would be over \$800. We are not prepared to say that this will not cover the extra costs involved in taking on extra traffic of this kind. In some cases the proposed rate on iron and steel articles is as high as \$1.40, as, for instance, on stovepipe iron (item 73). Where different minima are proposed, the rates vary in accordance generally with the minima. In few cases is the rate on steel and iron less than 90 cents. On pianos, to take an extreme example of a low minimum on the other hand, the minimum is 14,000 pounds, although the rate is \$3. This would yield a minimum car revenue of \$520 for a haul to the Pacific coast of perhaps 2500 miles, approximately.

If the proposed rates were considered in and of themselves, it would be difficult to find that the revenue they return per car would not be reasonably compensatory when per-car revenue under the proposed rates is compared with per-car revenue on both domestic and export traffic under the rates in effect subsequent to July 1, 1922. For example, from New York to Pacific-coast ports for export the rate on structural iron and steel, in carloads, with a minimum of 80,000 pounds, is 72 cents. This implies a minimum yield of \$576 per car. Similarly, from Chicago on the same articles to Pacific-coast ports for export, the rate is 50 cents, which implies a minimum revenue per car of \$400. Other rates, such as those on lumber and sash from the Pacific coast to Eastern destinations, might be cited for comparative purposes.

It will be unnecessary for reasons later indicated to canvass the entire list of articles embraced in the general west-bound application. So far as revenue is concerned we are satisfied that, taking the additional business by itself, the proposed rates generally and easily cover the extra out-of-pocket expenses involved. In certain instances the rates proposed — as, for example, on articles such as sewing machines, drugs, medicines, chemicals, chewing gum, rubber tires, carpets, and

leather — apparently would cover not only the extra costs but the average of all costs and would contribute to the net return on carrier property. Were the rate level alone to be considered, it would be difficult to condemn the proposed terminal rates in the general west-bound application. Moreover, the going water rates shown upon these articles, item by item, are — or at least at the time of the hearing were — such as not seriously to invalidate the proposed terminal rates as lower than presumably necessary to meet water competition. . . .

It seems clear that the lines east of Chicago have little if any reason to expect increased gross or net revenue from the proposed rates. The probabilities are that they would suffer substantial losses. . . .

We are not prepared to say that we could base upon the foregoing estimates of collateral losses of net revenue a necessary denial of the applications. But we are of opinion that before we grant the affirmative relief asked, we are entitled to be shown by the carriers the probable extent of such collateral losses of net revenue, if any, and the way in which such losses would be divided as between various carriers and territorial groups. If the carriers are of opinion that no collateral loss in net revenue would result, the obligation to make such showing is upon the carriers. Should they concede the probability of a net loss in revenue to the carriers as a whole, we should have to consider whether such a shrinkage would adversely affect the return at which we are required to aim under Section 15a; and if, reasonably assured on this point, we are prepared to allow the carriers to assume voluntarily a shrinkage in their net revenue, the question might arise whether it is lawful to focus the whole gain resulting to the shipping public upon those shippers mainly located in a particular section or sections, or whether the relief might not more appropriately be applied throughout a wider extent of territory and among a greater number of shippers. We find that the carriers have failed to make the necessary affirmative showing as to the collateral losses of revenue which would result from the proposed terminal rates.

There is another aspect of this general west-bound application which requires careful scrutiny. This is the way in which the rate structure resulting from its approval would comport with other sections of the act, particularly Section 3.

It is strongly contended that the resulting rate structure would unduly and unlawfully prejudice the Atlantic seaboard region, and would unduly and unlawfully prefer large sections of the central region from Pittsburgh to beyond the Missouri River, in respect of their traffic to

the intermountain country and to the Pacific coast, respectively. The same rate structure, it is averred, would unduly and unlawfully prefer the Pacific terminals, and would unduly and unlawfully prejudice the intermountain region in their respective rôles as customers or purchasers in markets east of the Colorado common points.

The carriers are not expecting, by reason of the low terminal rates, to meet in any large measure water competition from points on the Atlantic or the Gulf. They are interested primarily in securing certain traffic which originates inland, such as iron and steel at Pittsburgh, which now moves largely by rail to Baltimore and thence by water to the Pacific. Accordingly the carriers name an all-rail rate from Pittsburgh to the Pacific slightly in excess of the going rail-and-water rates, rail to Baltimore and water thence to the Pacific. If they did no more than this, and did it on a similar basis for each inland iron and steel producing group, they might well be within their rights and within the law, provided the rates conformed to the other criteria named herein. But having thus fixed a rate from Pittsburgh to the Pacific, they proceed to blanket this rate from all points of origin from the Atlantic to the Missouri River or even westward. Moreover, they propose at the same time to keep in effect rates from all Eastern origins in the same territory to intermountain destinations graded roughly according to the respective lengths of the hauls.

For example, Pittsburgh is accorded a rate of \$1 on item No. 10, iron and steel, to Pacific terminals because Pittsburgh can move the freight to Baltimore for 35 cents, and thence by water for approximately 60 cents or less. Pittsburgh, in other words, is given — perhaps appropriately given — a \$1 rate, in place of its present \$1.665 rate because of its advantage of location in respect of the Atlantic seaboard. But the same reason cannot justly be given for applying this same rate to iron and steel originating, let us say, at Chicago or the Missouri River. The all-rail rate, Chicago to Baltimore, is 60 cents, thence by water to the Pacific, 60 cents or less, making a through rail-and-water rate of \$1.20 measure approximately Chicago's relative advantage of location via rail and the Atlantic seaboard. Wholly with the avowed purpose of inducing competitive shipments from Chicago or the Missouri River to the Pacific, the region west of Pittsburgh is accorded a preferential rate structure, which is based on "market competition." But if Pittsburgh and Chicago and Omaha all ship to Reno or Spokane, Pittsburgh is still to be compelled to pay a higher rate than Chicago, and Chicago a higher rate than Omaha

and thus the more distant points suffer the disability of the longer hauls required.

The route, rail and water, is available to Pittsburgh at 35 cents (rail) *plus* 60 cents (water), a total of 95 cents. If, therefore, iron and steel are to move from Pittsburgh, all rail, west to the Pacific, it must have a rate not much over 95 cents. Chicago, however, if it moves its iron and steel via Baltimore, must pay 60 cents (rail) *plus* 60 cents (water), or \$1.20. Whether Chicago moves its iron and steel all rail, or rail and water via the Atlantic, Pittsburgh has available a route 20 cents cheaper. Via the Atlantic seaboard Chicago therefore is at a distance disadvantage, from the Pacific, of 600 miles, or in this case, of 20 cents per 100 pounds.

The carriers seek to justify this proposed rate structure on the ground that otherwise manufacturing will tend to be further concentrated on the congested Atlantic seaboard. They represent that their proposed rate structure will beneficially distribute manufacturing throughout the Middle West and Central West. But this they may not do, unless it can be done without creating undue rate preferences. *Sloss-Sheffield Steel & Iron Co. v. L. & N. R. R. Co.*, 46 I. C. C. 558, 562, 563.

The fact is well urged by the intermountain interests that the proposal to blanket all-rail rates from the Atlantic seaboard to the Missouri River, or even to the Colorado common points, will enable Pacific-coast purchasers to buy in any market in this vast domain under an equality of freight rates, and thus to profit by the widest competition. The intermountain country will continue under the handicap that in purchasing in the same region it must pay more freight on articles purchased in Pittsburgh than in Chicago and more on articles purchased in Chicago than in Kansas City. In other words, their markets are restricted, whereas the Pacific-slope purchasers may disregard distance in their choice of an Eastern market.

We find that the general west-bound application of these trans-continental carriers for authority to depart from the long and short haul provision of the fourth section of the Interstate Commerce Act on this record should be denied.

[C]

Class and Commodity Rates from Pennsylvania

Interstate Commerce Commission (1926), 115 I. C. C. 331

*Division 2, Commissioners Meyer, Campbell, and Woodlock*CAMPBELL, *Commissioner* :

By schedules filed to become effective May 20, 1926, the carriers forming the circuitous routes from points in the Scranton and Williamsport, Pennsylvania, groups to Central and Western trunk-line territories proposed to increase their class and commodity rates from points in these groups to points in the destination territories to the basis of the rates in effect from higher-rated intermediate groups. Upon protest of numerous shippers and shipping associations located in the origin groups, the operation of the schedules was suspended until September 17, 1926. There was also set for hearing in connection with this case fourth-section application No. 12846, whereby the same carriers respondent ask for authority to maintain class and commodity rates from points in the Scranton and Williamsport groups to points in central and western trunk-line territories without observance of the long and short haul provision of the Interstate Commerce Act. At the hearing the respondents offered no testimony in justification of the proposed increased rates, but devoted all of their evidence to justifying the present group adjustment and to the maintenance by the carriers forming the circuitous routes of rates at intermediate points which contravene the long and short haul provision of the fourth section. Accordingly, this report will be confined to a consideration of the evidence submitted in support of the fourth-section application. Rates are stated in cents per 100 pounds.

The Scranton group lies west of the New York group and north of the Philadelphia group. The Williamsport group lies west of the Scranton group and north of the Baltimore group. The Scranton and Williamsport groups were established in 1911 at the instance of shippers located at points in these groups; formerly they were a part of the New York and Philadelphia groups, respectively. The fourth-section departures, which have existed since the establishment of these groups and which the carriers had heretofore thought protected, arise in connection with the movement of traffic over lines comprising the circuitous routes. Thus, taking Scranton as a representative origin

point and Chicago, Illinois, as a representative destination point, the direct route is by way of the Delaware, Lackawanna & Western to Black Rock, New York, and the Wabash beyond, a distance of 768 miles. Over this route there are no fourth-section departures. However, should a shipment be delivered to the Central Railroad of New Jersey or the Delaware & Hudson or the New York, Ontario & Western at Scranton fourth-section departures will occur by reason of the fact that the routes formed by these carriers and their connections pass through groups taking higher rates. The following table, taken from applicants' exhibits, shows the direct route of the Lackawanna in connection with the Wabash and various departure routes formed by the Central Railroad of New Jersey and its connections from Scranton to Chicago, the distances over these routes, representative higher-rated intermediate points and the distances therefrom to Chicago, the sixth-class rates from these points, together with the ton-mile, car, and car-mile earnings hereon, based on a minimum carload of 36,000 pounds:

ROUTE	DIS- TANCE	CIR- CUITY	SIXTH- CLASS RATE	TON- MILE EARN- INGS ¹	EARN- INGS PER CAR ¹	CAR- MILE EARN- INGS ¹
	<i>Miles</i>	<i>Per Cent</i>	<i>Cents</i>	<i>Mills</i>		<i>Cents</i>
Short line; via D. L. & W. R. R., Black Rock, N. Y., Wabash Ry.	768	—	38	9.9	\$136.80	17.8
<i>Typical departure routes</i>						
1. C. R. R. of N. J., Haucks, Pa., Reading Co., Newberry Junction, Pa., N. Y. C. R. R. (E) Clearfield, Pa., N. Y. C. R. R. (W)	871	13	38	8.7	136.80	15.7
Higher-rated intermediate point: Sham- okin, Pa., Philadelphia rate group . .	749	—	45.5	12.1	163.80	21.9
2. C. R. R. of N. J., Allentown, Pa., Read- ing Co., Shippensburg, Pa., W. Md. Ry., Cherry Run, W. Va., B. & O. R. R.	989	29	38	6.8	136.80	13.8
Higher-rated intermediate points: Read- ing, Pa., Philadelphia rate group . . .	851	—	45.5	10.6	163.80	19.2
Shippensburg, Pa., Baltimore rate group	747	—	44.5	11.9	160.20	21.4
3. C. R. R. of N. J., Allentown, Pa., Read- ing Co., Shippensburg, Pa., W. Md. Ry., Durbin, W. Va., C. & O. Ry. . .	1242	62	38	6.1	136.80	11.0
Higher-rated intermediate points: Read- ing, Pa., Philadelphia rate group . .	1104	—	45.5	8.2	163.80	14.8
Shippensburg, Pa., Baltimore rate group	1000	—	44.5	8.9	160.20	16.0

The above table is typically illustrative of the situation which is presented with respect to other carriers forming the indirect routes

¹ Based on sixth-class rates and minimum carload weight of 36,000 pounds.

from points of origin in the two groups named to points in the destination territories. . . .

Numerous shippers and shippers' organizations located in the lower-rated groups appeared in support of the fourth-section relief. The testimony of these witnesses indicates that it is highly desirable to have all available routes open, and while denial of fourth-section relief to the carriers forming the indirect routes might not be unduly burdensome during ordinary transportation conditions, it would cause delay in times of car shortage and embargoes by the direct routes. These witnesses were unanimous in their opinion that a denial of the relief sought would result in loss of business to shippers in the Scranton and Williamsport groups, and that granting of the relief would be in the public interest. No one appeared at the hearing in behalf of shippers located at any of the higher-rated intermediate points.

The applicant carriers ask for relief without limitation as to circuitry, and in support of such request attempt to differentiate the basis of the application from that of circuitry of routes. In answer to a direct question as to whether the basis of the application is circuitry of routes rather than market competition their witness stated that it is not a matter of market competition but is a matter of circuitous routes and indirect lines passing through higher-rated territory.

The law is plain that regardless of the basis upon which relief is granted we must not permit the establishment of a rate to a more distant point that is not reasonably compensatory for the service performed. In a territory such as that here considered, where the rates in general via the direct hauls have been passed upon by us and where there is such a maze of possible routes, making it practically impossible to check and enumerate each route available in published tariffs, we must place some general limitations upon the relief granted, so that rates via direct routes will not be less than reasonably compensatory when applied via the circuitous hauls. The evidence is clear that the situation is that of indirect and circuitous lines and routes asking relief to meet the rates of direct lines and routes between competitive points, although passing through higher-rated territory or groups, and any relief granted will also be made subject to the limitation prescribed in the equidistant provision of the fourth section.

We find that respondents have not justified the proposed increased schedules. An order directing their cancellation and discontinuing the suspension proceeding will be entered.

The carriers parties to the fourth-section application here considered

will be granted authority to meet via their circuitous lines or routes the class and commodity rates contemporaneously maintained via the direct lines or routes from points in the Scranton and Williamsport groups to points in central and western trunk-line territories and to maintain higher rates at intermediate points, provided that the authority herein granted shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route from and to the competitive points, and provided further, that the present rates at the said intermediate points shall not be increased except as may hereafter be authorized by us, and shall in no case exceed the lowest combination; and provided further, that the relief herein granted shall not apply

1. Where the short line or route is 150 miles or less in length and the longer line or route is more than 70 per cent circuitous.

2. Where the direct line or route exceeds 150 miles but does not exceed 1000 miles in length and the longer line or route is more than 50 per cent circuitous, except that in instances where the short line or route exceeds 150 miles and the longer line or route does not exceed 255 miles relief will apply to such longer line or route even though the said longer line or route is more than 50 per cent circuitous.

3. Where the direct line or route exceeds 1000 miles in length and the longer line or route is more than $33\frac{1}{3}$ per cent circuitous, except that in instances where the short line or route exceeds 1000 miles and the longer line or route does not exceed 1500 miles in length, relief will apply to such longer line or route even though the said longer line or route is more than $33\frac{1}{3}$ per cent circuitous.

An appropriate order will be entered.

WOODLOCK, *Commissioner*, concurring:

Relief under the fourth section is justifiable only upon the theory that the traffic concerned partakes of the nature of a by-product. As a by-product, and only as a by-product, does such traffic qualify itself for this relief under Sections 1 and 3 of the act. In my opinion the traffic here concerned is of that nature, and is entitled to relief. To that extent I concur in the report. I do not, however, agree that on the facts there is warrant for limiting the circuitry under such relief to the extent prescribed in the report. There is no reason for supposing that, for instance, on route No. 3 as shown in the report 11 cents per car-mile is not fully compensatory on by-product traffic between Scranton and Chicago. I see no reason for departing from our not unusual practice of permitting up to 70 per cent circuitry on all the routes here concerned.

QUESTIONS

1. In the Transcontinental Rate case the situation was such that certain of the prerequisites to relief by Section 4 were present. What were these? Why was such relief denied?

2. Define "reasonably compensatory." How would you determine whether a rate conforms to your definition? Would it be desirable to leave the decision on this matter to the carriers concerned?

3. Show how the intermountain territory would suffer if the carriers' application had been granted.

4. Describe the effect of granting the application of Section 4 in the second case quoted.

5. What is the meaning of "by-product traffic"? How does that justify a violation of Section 4?

6. What grounds are there for believing that the charges in the second case quoted are reasonably compensatory?

7. The Illinois Central alleges potential water competition and seeks to lower its rate on bananas and oranges from New Orleans to St. Louis. Decide. If the commodity concerned had been steel castings or cottonseed oil, would the decision have been the same?

8. What restrictions are now made in rates from intermediate points on circuitous routes where the terminal points have been granted relief by Section 4?

9. Point A and point B are 400 miles apart by a direct route — railroad X. Railroad Y also runs from A to B, its lines being 480 miles in length. It obtains permission to charge the same rates as those charged by X. How will this affect its rates between A and C, a point on its line 100 miles from B? between A and D, a point 40 miles from B?

10. What is meant by "potential water competition"? What is its present effect on railroad rates?

11. Summarize the present status of the long and short haul provision.

I. RATE FIXING

1. UNJUST DISCRIMINATION FORBIDDEN

[The broad prohibition of unjust discrimination in any manner (already discussed in this section under G) applies, as has been seen, to rates. But besides this negative provision, there were in the act of 1887 certain positive requirements as to rates. These have been strengthened by subsequent acts, which have at the same time carried the government farther and farther into the domain of rate-making as will be seen in this section.]

2. RATES MUST BE JUST AND REASONABLE

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 1, paragraph 5 (I. C. Act, pp. 3-4). To show the development of the paragraph, it is printed below as it appeared before the Transportation Act of 1920. The words in parentheses were excised, those underlined once were added by the Hepburn Act of 1906, and those underlined twice were added by the act of June 18, 1910. The changes made in 1920 will appear from a comparison of the text here given with that in the I. C. Act.]

SECTION 1. (5) All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone or cable, as afore-said, or in connection therewith (or for the receiving, delivering, storage or handling of such property), shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided, That* messages by telegraph, telephone or cable subject to the provisions of this act may be classified into day, night, repeated, unrepeat-ed, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages: *And provided further, That* nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

a. INTERSTATE COMMERCE COMMISSION HAS NO RATE-MAKING POWER
UNDER THIS PROVISION

Interstate Commerce Commission *v.* Cincinnati,
N. O. & T. P. R. Co.

United States Supreme Court (1897), 167 U.S. 479

[Upon complaint from the freight bureau of the Cincinnati Chamber of Commerce and from the freight bureau of Chicago that the rates charged on different classes of freight by defendant railroads between Chicago and Cincinnati and various cities in the South were not just and reasonable, the Interstate Commerce Commission conducted an investigation and hearing. It found that the rates in question were

unreasonable and unjust, and ordered the carriers to cease and desist from charging, after July 10, 1894, more than certain rates set forth in a schedule prescribed by the Commission. The railroads failed to comply, and the Interstate Commerce Commission instituted a suit in a Federal court asking for a mandamus to compel obedience to its order. The circuit court of appeals submitted the following question to the Supreme Court for an opinion: "Had the Interstate Commerce Commission jurisdictional power to make the order hereinbefore set forth — all proceedings preceding said order being due and regular, so far as procedure is concerned?""]

MR. JUSTICE BREWER delivered the opinion of the court:

. . . Before the passage of the act it was generally believed that there were great abuses in railroad management and railroad transportation, and the grave question which Congress had to consider was how those abuses should be corrected and what control should be taken of the business of such corporations. The present inquiry is limited to the question as to what it determined should be done with reference to the matter of rates. There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so.

The question debated is whether it vested in the Commission the power and the duty to fix rates; and the fact that this is a debatable question, and has been most strenuously and earnestly debated, is very persuasive that it did not. The grant of such a power is never to be implied. The power itself is so vast and comprehensive, so largely affecting the rights of carrier and shipper, as well as indirectly all commercial transactions, the language by which the power is given had been so often used and was so familiar to the legislative mind and is capable of such definite and exact statement, that no just rule of construction would tolerate a grant of such power by mere implication. Administrative control over railroads through boards or commissions was no new thing. It had been resorted to in England and in many of the states of this Union. In England while control had been

given in respect to discrimination and undue preferences, no power had been given to prescribe a tariff of rates. In this country the practice had been varying. It will be interesting to notice the provisions in the legislation of different states. We quote the exact language following some of the quotations with citations of cases in which the statute has been construed :

[The quotations from state statutes are omitted.]

... The legislation of other states is referred to in the Fourth Annual Report of the Interstate Commerce Commission, Appendix E, pages 243 and following. It is true that some of these statutes were passed after the Interstate Commerce Act, but most were before, and they all show what phraseology has been deemed necessary whenever the intent has been to give to the commissioners the legislative power of fixing rates.

It is one thing to inquire whether the rates which have been charged and collected are reasonable, — that is a judicial act ; but an entirely different thing to prescribe rates which shall be charged in the future, — that is a legislative act. . . .

It will be perceived that in this case the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, and their application to the court was for a mandamus to compel the companies to comply with their decision ; that is, to abide by their legislative determination as to the maximum rates to be observed in the future. Now, nowhere in the Interstate Commerce Act do we find words similar to those in the statutes referred to, giving to the Commission power to "increase or reduce any of the rates" ; "to establish rates of charges" ; "to make and fix reasonable and just rates of freight and passenger tariffs" ; "to make a schedule of reasonable maximum rates of charges" ; "to fix tables of maximum charges" ; to compel the carrier "to adopt such rate, charge, or classification as said commissioners shall declare to be equitable and reasonable." The power, therefore, is not expressly given. Whence then is it deduced ? In the first section it is provided that "all charges . . . shall be reasonable and just ; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." Then follow sections prohibiting discrimination, undue preferences, higher charges for a short than for a long haul, and pooling, and also making provision for the preparation by the companies of schedules of rates, and requiring their publication. Section 11 creates the Inter-

state Commerce Commission. Section 12, as amended March 2, 1889 (25 Stat. at L. 858), gives it authority to inquire into the management of the business of all common carriers, to demand full and complete information from them, and adds, "and the Commission is hereby authorized to execute and enforce the provisions of this act." And the argument is that in enforcing and executing the provisions of the act it is to execute and enforce the law as stated in the first section, which is that all charges shall be reasonable and just, and that every unjust and unreasonable charge is prohibited; that it cannot enforce this mandate of the law without a determination of what are reasonable and just charges; and as no other tribunal is created for such determination, therefore it must be implied that it is authorized to make the determination, and, having made it, apply to the courts for a mandamus to compel the enforcement of such determination. In other words, that though Congress has not in terms given the Commission the power to determine what are just and reasonable rates for the future, yet as no other tribunal has been provided, it must have intended that the Commission should exercise the power. We do not think this argument can be sustained. If there were nothing else in the act than the first section commanding reasonable rates, and the twelfth empowering the Commission to execute and enforce the provisions of the act, we should be of the opinion that Congress did not intend to give to the Commission the power to prescribe any tariff and determine what for the future should be reasonable and just rates. The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative. Pertinent in this respect are these observations of counsel for the appellees :

Article 2, Section 3, of the Constitution of the United States, ordains that the President "shall take care that the laws be faithfully executed." The Act to Regulate Commerce is one of those laws. But it will not be argued that the President, by implication, possesses the power to make rates for carriers engaged in interstate commerce. . . .

The 1st section simply enacted the common-law requirement that all charges shall be reasonable and just. For more than a hundred years it has been the affirmative duty of the courts "to execute and enforce" the common-law requirement that "all charges shall be reasonable and just"; and yet it has never been claimed that the courts, by implication, possessed the power to make rates for carriers.

But the power of fixing rates under the Interstate Commerce Act is not to be determined by any mere considerations of omission or

implication. The act contemplates the fixing of rates and recognizes the authority in which the power exists.

[The court quotes Section 6 of the Interstate Commerce Act.]

... Now, but for this act, it would be unquestioned that the carrier had the right to prescribe its tariff of rates and charges, subject to the limitation that such rates and charges should be reasonable. This Section 6 recognizes that right, and provides for its continuance. It speaks of schedules showing rates and fares and charges which the common carrier "has established and which are in force." It does not say that the schedules thus prepared, and which are to be submitted to the Commission, are subject, in any way, to the latter's approval. Filing with the Commission and publication by posting in the various stations are all that is required, and are the only limitations placed on the carrier in respect to the fixing of its tariff. Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the tariff upon its own line; but further when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is only that such joint tariff shall be filed with the Commission, and nothing but the kind and extent of publication thereof is left to the discretion of the Commission.

It will be perceived that the section contemplates a change in rates either by increase or reduction, and provides the conditions therefor; but of what significance is the grant of this privilege to the carrier if the future rate has been prescribed by an order of the Commission, and compliance with that order enforced by a judgment of the court in mandamus? The very idea of an order prescribing rates for the future, and a judgment of the court directing compliance with that order, is one of permanence. Could anything be more absurd than to ask a judgment of the court in mandamus proceedings that the defendant comply with a certain order unless it elects not to do so? The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the Commission.

We have, therefore, these considerations presented: First. The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second. That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct. Third. Incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the Commission to execute and enforce the provisions of the act, does not by implication carry to the Commission or invest it with the power to exercise the legislative function of prescribing rates which shall control in the future. Fourth. Beyond the inference which irresistibly follows from the omission to grant in express terms to the Commission this power of fixing rates, is the clear language of Section 6, recognizing the right of the carrier to establish rates, to increase or reduce them, and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and, second, the filing of the tariff with the Commission. The grant to the Commission of the power to prescribe the form of the schedules, and to direct the place and manner of publication of joint rates, thus specifying the scope and limit of its functions in this respect, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the Commission.

These considerations convince us that under the Interstate Commerce Act the Commission has no power to prescribe the tariff of rates which shall control in the future, and, therefore, cannot invoke a judgment in mandamus from the courts to enforce any such tariff by it prescribed.

But has the Commission no functions to perform in respect to the matter of rates; no power to make any inquiry in respect thereto? Unquestionably it has, and most important duties in respect to this

matter. It is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business. And with this knowledge it is charged with the duty of seeing that there is no violation of the long and short haul clause; that there is no discrimination between individual shippers, and that nothing is done by rebate or any other device to give preference to one as against another; that no undue preferences are given to one place or places or individual or class of individuals, but that in all things that equality of right, which is the great purpose of the Interstate Commerce Act, shall be secured to all shippers. It must also see that that publicity, which is required by Section 6, is observed by the railroad companies. Holding the railroad companies to strict compliance with all these statutory provisions and enforcing obedience to all these provisions tends, as observed by Commissioner Cooley in *Re Chicago, St. P. & K. C. R. Co.*, 2 I. C. C. Rep. 231, 261, to both reasonableness and equality of rate as contemplated by the Interstate Commerce Act. . . .

Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute. As it did not give the express power to the Commission it did not intend to secure the same result indirectly by empowering that tribunal to determine what in reference to the past was reasonable and just, whether as maximum, minimum, or absolute, and then enable it to obtain from the courts a peremptory order that in the future the railroad company should follow the rates thus determined to have been in the past reasonable and just.

The question certified must be answered in the negative, and it is so ordered.

MR. JUSTICE HARLAN dissented.

QUESTIONS

1. Do you think the reasoning in this case unduly favorable to the railroads?
2. Do you understand the court to be of the opinion that the Commission had no power to determine whether charges in a particular case were just and reasonable?
3. Would it be of any use for the Commission to decide that certain charges were not just and reasonable unless it could also indicate what would be a just and reasonable charge and could compel the railroad to conform thereto?

4. Is there a difference between the power exercised by the Commission in the principal case and a general rate-making power?

5. "The fact, if it be a fact, that after protest, remonstrance and the payment of excessive and unreasonable charges, the shipper may bring suit for the amount of the difference between the lawful and unlawful rate is neither an adequate nor an equitable remedy." Do you agree with this?

6. Why was not the "common-law requirement that all charges shall be reasonable and just" a sufficient protection to shippers?

7. "The same rule of interpretation which denies the authority of the Commission to fix a reasonable rate for the future, after issue made and facts found, will, when occasion arises, be found to leave the Commission without authority, in the absence of additional legislation, to enforce any order to prevent unjust discrimination or undue preference in the future." Do you agree with this?

b. WHO DETERMINES REASONABLENESS OF RATES?

Illinois Central Railroad Co. v. Interstate Commerce Commission

United States Supreme Court (1907), 206 U.S. 441

[The Illinois Central Railroad advanced the rate on pine lumber from the Gulf states to points on the Ohio River two cents per hundred pounds. The Central Yellow Pine Association complained to the Interstate Commerce Commission; and the latter, after a hearing, found the increase not reasonable and ordered the railroad to desist from enforcing it. The railroad refused to obey, and the Commission asked for a mandamus, which was granted in the circuit court. The railroad appealed.]

MR. JUSTICE McKENNA delivered the opinion of the court :

Counsel for appellants in his oral argument made the declaration that it would not be necessary for this court to open the pages of testimony contained in the record, and says in his supplemental brief :

I do not insist that this court shall read the voluminous testimony contained in these records, but I do most respectfully ask it to lay down the rules or principles of transportation law which are fairly involved in the just determination of these cases, and to remand them to the Commission, to be reëxamined upon the testimony in conformity with the principles of transportation law to be announced by this court.

To what, then, shall we resort? How shall we determine what "principles of transportation law" were involved? How determine

whether they were recognized and applied, or denied and rejected, by the Commission, and, necessarily, by the circuit court? An examination of the testimony, by concession of counsel, is out of the question. And the findings of the Commission are made by law *prima facie* true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. *Louisville & N. R. Co. v. Behlmer*, 175 U.S. 648; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U.S. 1. And, in any special case of conflicting evidence, a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying. In the case at bar these considerations are reinforced by a concurrent judgment of the circuit court.

The question is one of the reasonableness of a rate, and such a question was said to be one of fact in *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 184. In these cases, however, it was declared that the conclusions of the Commission are subject to review if it excluded "facts and circumstances that ought to have been considered." Upon this declaration appellants rely, and justify their invocation that this court express and enforce the principles of transportation which, they contend, the Commission disregarded; and appellants venture the observation that unless this be done "there will be no settled principles of law for the guidance of either the Commission or of the courts," and that "the interstate railroad companies will be the only persons in this country who will not be able to obtain the opinion of the courts upon questions of law which vitally affect their interest." We think the apprehension is groundless and is demonstrated to be groundless by the cases cited. In all of them legal propositions were reviewed as elements in the inquiry of the reasonableness of a rate. Those cases, however, are in marked contrast to the pending case. It will be observed that in them the instances were very simple. There was a salient circumstance in each of them about which there was no uncertainty. In other words, it was unconfused by dispute and was not put to question by a conflict of testimony. A definite legal proposition unmingled with fact was presented, and the only act of judgment exercised by the Commission was to reject it. . . .

In all these cases, therefore, there was a single, distinct, and domi-

nant proposition of law which the Commission had rejected, and the exact influence of which, in its decisions, could be estimated. Indeed, they were mere constructions of the statute, the delegation of the Commission's duties and power. . . .

The concession of counsel with which we have commenced this opinion is a frank recognition of the effect which this court has given to the decisions of the Interstate Commerce Commission on questions of fact. And we have said very recently: "The statute gives *prima facie* effect to the findings of the Commission, and, when those findings are concurred in by the circuit court, we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed." *Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission*, 206 U.S. 142. . . .

The questions submitted to the Commission, as we have said with tiresome repetition, perhaps, was one which turned on matters of fact. In that question, of course, there were elements of law, but we cannot see that any one of these or any circumstances probative of the conclusion was overlooked or disregarded. The testimony was voluminous. It is not denied that it was conflicting, and, by concession of counsel, it included a large amount of testimony taken on behalf of appellants in support of the propositions contended for by them. Whether the Commission gave too much weight to some parts of it and too little weight to other parts of it is a question of fact, and not of law. It seems from the findings, report, and conclusions of the Commission that it considered every circumstance pertinent to the problem before it.

Further testimony was taken by the circuit court and its judgment confirmed that of the Commission and approved its order. Decree affirmed.

MR. JUSTICE MOODY took no part in the decision of this case.

MR. JUSTICE BREWER dissented.

QUESTIONS

1. Do you think it preferable that the Interstate Commerce Commission should determine whether or not rates are reasonable or that the courts should do so? Why?

2. Distinguish between questions of law and questions of fact.

3. Upon what theory are the findings of a trial court on questions of fact not reviewable in the higher court?

4. Since the requirement that rates shall be just and reasonable is imposed by law, why is the question of reasonableness not one of law?

5. Is it a question of law or a question of fact whether there is evidence on which a finding of unreasonableness can be based?

6. Under what circumstances would the court review conclusions of the Interstate Commerce Commission as to the reasonableness of rates?

7. "The fixing of the rate in the first instance is a legislative function, but whether that rate, when fixed, is reasonable is a judicial question." Is this statement reconcilable with the opinion in the principal case?

8. A tariff rule of the D railroad exacted a reconsignment charge of five dollars a car, but excepted grain held on tracks "for inspection and disposition orders incident thereto at billed destination." The railroad claimed that sixteen cars of grain shipped by P were liable to the charge, and collected it; P claimed they came within the exception and sued to recover the eighty dollars. D denied the jurisdiction of the court until the true construction of the tariff had been determined by the Interstate Commerce Commission. Is this a good defense?

c. STANDARDS OF REASONABLENESS¹

The statement so frequently made and reiterated that the problem of rate-making is a difficult one, means no more than that there is no definite scientific rule by which it can, with certainty, be determined just what is a reasonable rate.

The "tribunal appointed by law and informed by experience" has evolved and is evolving principles which will furnish sufficient data to justify generalizations broad enough to authorize the deduction of scientific principles. In making these deductions, the first consideration is the agency which performs the service. This agency performs a public service, devotes its property to a public use and must, therefore, submit to public regulation; but the capital of this agency is private capital entitled to protection as such. To these facts the law applied the principle that those who furnish such private capital so devoted to a public use are entitled to receive a fair return from such investment. What is a "fair return" involves economic considerations such as the risks involved in the investment, the security of the investment because it is a practical monopoly, returns which capital may secure from other investments, as well as the public necessity that capital shall be devoted to this special use. "Fair return" necessarily involves the question of the value of the property so devoted to the public use. In determining this value there must be considered the

¹ Edgar Watkins, *On Shippers and Carriers* (3d ed.), Vol. I, pp. 406-408.

investment, that made originally and that added in permanent improvements, the present market value of the stocks and bonds, which are but symbols of the investment, the question of the cost of the property, its reproduction cost and the methods of making the investment, that is, was the investment made wisely and honestly or otherwise. The character of the territory served by the carrier is not infrequently a fact which must not be lost sight of. The extent and regularity of the whole movement is determined by the character of the inhabitants and the kinds of business conducted by them. The physical situation of the agency as to grades, curves, etc., may materially affect the cost of the service and thereby determine the amount of the return which should be received.

The attitude of the agency to the question is not without value; the way the problem has been solved by the agency in a long course of dealing would indicate that such agency has found a solution not unfair to itself.

The thing transported must be considered. Is it heavy as compared with the space it occupies? Does it require any special equipment? Is it subject to loss or injury in transporting? Is there much or little of it? The answers to these questions furnish facts which must be considered in classifying commodities so as to fix rates or charges for their transportation.

The places from and to which the commodities move are factors in the problem. The distance a thing is hauled must be considered, as the greater the distance the less ordinarily is the cost for each mile of the haul, and the service of loading and unloading applies the same to a short as to a long haul.

The situation of the man who owns the thing moved and the purpose of the movement frequently affects the question of the rate. This does not mean that rates must be determined by the use to which the commodity is put; it means that a producer of a commodity which is also produced by others in the same general territory, the market for all the producers being the same, cannot ship otherwise than upon rates not greatly higher than his competitors. This principle is similar to the one that justifies a rate basis made to meet market competition. A thing may grow or be mined in widely different localities, and the sale of the thing may be in the same market. Obviously that this market may have the benefit of competition and that producing localities may have the benefit of a market, distance cannot be made an absolute measure for the rates.

So the public interest must not be disregarded in determining what this public agency shall receive for performing the duties which society has farmed out to it. Rates must not be so adjusted as to deprive the public of the service, commodities must be moved and they cannot be moved if the charge therefor exceeds the value to be derived from the movement. One producer must not be permitted a monopoly in serving the public. That charges may not exceed the value of the service is an economic law depending upon neither court nor commission for its enforcement.

Carriers may with propriety and for the good of the general public make rates barely more than the cost of the particular movement, in order to develop industries, create and maintain competition and serve those who because of their location distant from the point of production cannot be otherwise served. Rate-making tribunals may not make rates so low as to deprive private capital of a substantial return on the fair value of the property devoted to the public use.

While long existing wrongs do not become rights and no one can have a vested interest in a wrong, the fact that in the slow evolution toward a science of rate-making there have grown up rate situations inconsistent with the principles which must exist when there is such a science, does not justify an abrupt and radical alteration of these situations. Existing conditions are facts which must be recognized in the application of all abstract economic principles, and while the principle is not destroyed by such recognition, it may be inapplicable to the particular situation.

To determine what is a reasonable rate, the law must be applied, economics considered and ethics invoked, and while the facts to be weighed are multitudinous and the scientific principles few, we may say that it is not fanciful to anticipate that a system of rate-making will be evolved which will approach justice. Shippers and carriers contending each with the other, sometimes selfishly, but not infrequently with an earnest desire for a right solution, presenting their theories to a disinterested and unbiased tribunal, "appointed by law and informed by experience," may furnish data which, being sifted, studied and classified in its reports, will enable that tribunal to solve the problem.

[A more detailed consideration of many of the points mentioned above will be found in *J, infra*, "Economic Bases of Rate Fixing."]

QUESTIONS

1. Are the "principles" of rate-making, referred to above, principles of law or of fact? For example, would a court review a finding of the Interstate Commerce Commission for failure to apply one of the principles?

2. List in order of importance the principles mentioned above.

3. "Rates should be fixed according to the value of the service to the shipper, including the value of the goods and the profit he will make by shipping them; as in taxation, ability to pay should be a chief criterion." Criticize this.

4. Why would the cost of service to the carrier not be an ideal and sufficient basis for rate-making?

5. As governmental control of rate-making grows out of the police power, why should the public welfare not be the sole test of reasonableness in rate-making?

6. Why would it not be sufficient for the Commission to compare rates complained of with those charged by other railroads for similar services?

7. Is not "fair return" a sufficient test of the reasonableness of rates?

8. Is it or is it not just and reasonable to charge "whatever the traffic will bear"? Exactly what does this phrase mean?

9. Why not refer rate-making entirely to economic experts as a matter to be determined according to economic laws?

10. Is the failure of a carrier to show a profit conclusive evidence that the rates charged by it are not just and reasonable?

11. Upon whom should the burden of proof fall in an inquiry as to the reasonableness of rates?

12. A carrier pleads that there is a presumption that a particular rate is reasonable because it has been filed with the Interstate Commerce Commission and published according to Section 6. Decide.

13. Do you understand that the first proviso in the fifth paragraph of Section 1 excepts messages by wire or wireless from the requirement that charges be just and reasonable? If so, why? If not, what is its effect?

d. EXCHANGE OF SERVICES

QUESTIONS

1. Why should the second proviso of the fifth paragraph of Section 1 be included with a regulation regarding the reasonableness of transportation charges?

2. Do you understand that this proviso means that the requirement of reasonableness shall not apply to charges made by a railroad to a telegraph company for carrying its goods?

3. The X railroad and the Y telegraph company agree that up to a certain amount, calculated at the regular day rates of the Y company, it should deliver free of charge messages pertaining to the business of the X railroad to any points on its system, whether on or beyond the railroad lines, and that up to an amount calculated in like manner the railroad should transport materials, supplies, and employees of the Y company needed for the construction and maintenance of its lines, whether on or off the lines of the road. Is this valid under the Interstate Commerce Act?

3. PUBLICITY OF RATES

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 6, paragraphs 1, 2, 4, 5, 6, 7 (first part), 9-12 (I. C. Act, pp. 22-26). The requirement that schedules of rates should be printed and kept for public inspection was a part of the act of 1887, but it was enlarged and completely rewritten in 1906. Sections 9-12 were added in 1910, and certain formal changes were made by the Transportation Act of 1920.]

QUESTIONS

1. Against what specific evils is the requirement of publicity directed?

2. The A railroad had a ten-cent rate for grain from Omaha to Kansas City; the B railroad, a ten-cent rate from Kansas City to Texarkana, Texas. Both these rates were filed with the Interstate Commerce Commission. By oral agreement the two roads made for X a special joint rate of sixteen cents on grain shipped from Omaha to Texarkana, each road to get eight cents. The B railroad disregarded the agreement after two months, required rebilling at Kansas City, and collected the ten-cent rate. No joint rate from Omaha to Texarkana was filed or published. X sued the B railroad to recover damages for breach of contract. Can he recover?

3. Must a railroad file with the Interstate Commerce Commission a regulation limiting its liability for baggage to a hundred dollars unless a passenger declares a higher value and pays excess charges?

4. Should demurrage charges be shown in the printed schedules? Charges for cartage when done by the railroad?

5. Can a carrier enforce a rule, printed on its tickets, that tickets are nontransferable, when the published schedules say nothing about nontransferability?

6. What are the differences between "publishing," "posting," and "filing"? Are all three acts necessary to establish a legal rate?

7. A shipper indicted under the Elkins Act for accepting rebates pleads that the rates filed with the Interstate Commerce Commission and published by the carrier were not legally operative because the carrier had failed to post them. Is the defense good?

8. D asks a ticket agent for a summer round-trip ticket from Chicago to Yellowstone Park, going by way of St. Louis and Denver and returning by way of St. Paul. There is a special rate filed with the Interstate Commerce Commission for such tickets by various routes, but none by way of St. Louis. The agent sells a ticket by the route requested at the special rate. Later the carrier sues D to recover the difference between the special rate and the regular rate through St. Louis, Denver, etc. Decide.

9. A carrier contracts with a shipper, at the published rate, to rush a carload of high-grade horses to a point on its line to connect with a fast freight running three times a week to a horse market in Chicago. It fails to make the connection, and D suffers \$3000 damages. He sues the carrier, which pleads that the contract was illegal under Section 6. Decide.

10. Would your decision in the last case be different if the contract had been made at twice the regular rate?

11. Under Section 6 must the Grand Trunk Railroad file and publish rates for passenger traffic from Detroit to Boston through Toronto?

12. Is a carrier operating in the United States, which by agreement with Canadian railways has established through routes and joint rates between points in the United States and points in Canada, required by Section 6 to publish and file rates applicable to that part of the transportation which takes place within the United States, or to publish and file the joint rates, or both?

13. The Illinois Central Railroad contracts with P to carry his freight from Chicago to New Orleans, and there secure and guarantee an ocean rate of \$9.60 a ton from New Orleans to Buenos Aires. The railroad has not previously filed or published a through rate from Chicago to Buenos Aires. It fails to secure an ocean carrier at New Orleans, and P suffers damages thereby. Can he recover from the railroad?

14. Why should the penalty of \$250 for misstatement of a rate go to the United States rather than to the person who suffers damage thereby?

15. P is told by the local agent of a railroad that the rate on corn to a certain city is ten cents per hundred pounds, and he makes contracts with millers on that basis. It turns out that the rate filed with the Interstate Commerce Commission but not posted in the station is fourteen cents, and P suffers a loss on his contracts. He sues the railroad to recover damages. Decide.

16. Must telegraph companies file their tariff of charges with the Interstate Commerce Commission?

4. STABILITY OF RATES

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 6, paragraph 3 (I. C. Act, pp. 23-24). The act of 1887 forbade an *advance* in the published rates without ten days' public notice. An amendment of 1889 added the prohibition of a

reduction without three days' public notice. The present form of the requirement was enacted in the Hepburn Act of 1906 except for the second proviso, which was added by the Transportation Act of 1920.]

QUESTIONS

1. What economic reasons are there for requiring as much as thirty days' notice of changes in rates?
2. Do you think the paragraph gives the Commission too much discretion in modifying the requirement imposed?
3. Give examples of conditions that, in your opinion, would constitute "good cause" for allowing changes on less than thirty days' notice.
4. Would it be desirable to make a distinction between the length of notice required in the case of rate increases and that in the case of rate reductions?

5. OBSERVANCE OF RATES

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 6, paragraph 7 (last part), Section 10, paragraph 1 (proviso only) and paragraphs 2 and 3, and in the Elkins Act, Section 1 (the second sentence in the first paragraph and all the second paragraph) (I. C. Act, pp. 24-25, 30-31, 88-89). The act of 1887 forbade any departure from the published rates, but the present form of the last part of paragraph 7 in Section 6 dates from 1906. The portions of Section 10 referred to were added to the act in 1889; but the words "or the transmission of intelligence" were placed in the proviso by the Transportation Act of 1920. Paragraph 3 was considerably amplified in 1910; to facilitate comparison it is printed below as it appeared before the amendment of 1910. The words "or shipper" in the second paragraph of Section 1 of the Elkins Act were inserted in 1906. It should be remembered that departure from the lawful rates is a form of discrimination and consequently is subject to the penalties for discrimination already cited under IV, G, 2; attention is directed particularly to those parts of the Elkins Act given in that section. Reference should also be made to Section 16, paragraphs 8-10, of the Interstate Commerce Act (see IV, E, 2) and to Section 23 (see IV, E, 3).]

SECTION 10. (3) [Before the amendment of 1910.] Any person, and any officer or agent of any corporation or company who shall deliver

property for transportation to any common carrier subject to the provisions of this act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

QUESTIONS

1. What does the word "different" add to "greater or less"?
2. The Chicago and North Western Railroad agrees to issue a thousand dollars' worth of commutation tickets to the *Chicago Tribune* in return for a thousand dollars' worth of advertising in that paper. Is this a violation of Section 6 of the Interstate Commerce Act?
3. P is injured in an accident on the D railroad in 1885, and the railroad agrees to issue to him an annual pass over its line (which is interstate) as long as he lives, in consideration of his relinquishment of any claim for damages. After 1906 the railroad refuses to carry out this agreement on the ground that it is forbidden to do so by the Hepburn Act. P sues for specific performance. Decide.
4. P makes a map worth \$500 for the D railroad in 1905, and D agrees to pay him \$150 in cash and the rest in transportation. After P has received \$100 in transportation, D in 1907 refuses to furnish any more. Advise P.
5. May a railroad accept a promissory note of a shipper in payment of freight without violating the Hepburn Act?
6. In 1920 the Associated Press made a five-year contract with the Postal Telegraph Company for a private wire between Omaha and San Francisco at the rates then scheduled for such service to news agencies. In 1923 the telegraph company establishes a lower schedule of rates for such service. Can the Associated Press claim the lower rates for the rest of its contract?
7. What do the second and third paragraphs in Section 10 add to the proviso of the first paragraph?

8. What is the value of the amendments made in 1910?

9. A carload of lumber is shipped from a California lumber camp to Portland, Oregon. The consignee unloads and measures it. By misrepresenting the amount thereof to the railroad, he secures a bill for less than the lawful charge. Is this obtaining or attempting to obtain transportation at less than the regular rates?

[B¹]

We recommend that each of the four subdivisions of Section 10 of the Interstate Commerce Act be amended by providing therein a minimum fine of not less than \$500 for each offense. That section carries a maximum penalty of \$5000 but no minimum. . . .

The purpose of the section, and especially subdivisions (2), (3), and (4), obviously is to maintain the integrity of published tariff rates, and to prevent and punish unjust discrimination and favors granted or received by means of false billing, false weights, claims, or other device. Experience shows that this section is violated by shippers more frequently than any other section of the act. Such violations are profitable, not only because of the saving in freight charges, by defeating the applicable rates, but also because of the advantage thus obtained by the violator over his competitor. The railroads themselves maintain a force to police billing and weights, but a great many violations go undetected despite their efforts. We feel certain that the establishment of a minimum as recommended would result in greater harmony than exists now between the fines imposed by courts in different jurisdictions and practically eliminate violations of law which involve only comparatively small amounts of money.

Verdicts or pleas of guilty have been obtained in 64 prosecutions brought under this section since 1920. In 7 of these the fines imposed were substantial. The average fine in the remaining 57 cases, involving 478 counts, was only \$151 per count. In 165, or 34.5 per cent of those 478 counts, the highest fine imposed was \$50 per count, and several were as low as \$10 per count. Two defendants were sentenced to prison.

Although the specific transactions punishable under Section 10 are different from those reached through the Elkins Act, the fundamental purpose of the two enactments is identical, namely, preventing discrimination and maintaining the integrity of published rates. The

¹ Forty-second Annual Report of the Interstate Commerce Commission (1928), pp. 16-17.

Elkins Act carries a minimum penalty of \$1000, the maximum being \$20,000 for each offense. . . .

Section 10 is vitally important in maintaining the regular tariff rates by compelling accurate and truthful description and classification by shippers of their property. Providing a minimum penalty of not less than \$500 for each violation thereof, will render far more effective the efforts of the Commission to enforce that section.

6. THE INTERSTATE COMMERCE COMMISSION GIVEN POWER TO PRESCRIBE MAXIMUM RATES (1906) AND REASONABLE CLASSIFICATIONS (1910)

[Section 15 of the act of 1887 only gave the Commission power to determine whether there had been a violation of the act and to order carriers to cease and desist from such violation. The power to prescribe maximum rates was given by the Hepburn Act of 1906, and the power to prescribe reasonable classifications was given in 1910. The present control of the Commission over rates and classifications as defined by the Transportation Act of 1920 will be considered in IV, I, 9, *infra*; but to make the historical development of that control clearer, the first, third, and eighth paragraphs of Section 15 of the act are given here as they stood before 1920. The text is substantially derived from the Hepburn Act, but the words in parentheses were deleted and those underlined were added by the amending act of 1910.]

SECTION 15. (1) That whenever, after full hearing upon a complaint made as provided in section thirteen of this act, (or upon complaint of any common carrier), or after full hearing under an order for investigation and hearing made by the Commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the Commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers (affecting such rates) subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission

is hereby authorized and empowered (and it shall be its duty) to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice (in respect to such transportation) is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

(3) The Commission may also, after hearing, on a complaint or upon its own initiative without complaint, establish through routes and joint classifications, and may establish joint rates as the maximum to be charged and may prescribe the division of such rates as hereinbefore provided and the terms and conditions under which such through routes shall be operated (when that may be necessary to give effect to any provision of this act), whenever the carriers (complained of) themselves shall have refused or neglected to establish voluntarily such through routes or joint classifications or joint rates (provided no reasonable or satisfactory through route exists); and this provision shall apply when one of the connecting carriers is a water line. The Commission shall not, however, establish any through route, classification, or rate between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business and railroads of a different character, nor

shall the Commission have the right to establish any route, classification, rate, fare, or charge when the transportation is wholly by water, and any transportation by water affected by this act shall be subject to the laws and regulations applicable to transportation by water.

(8) If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section.

QUESTIONS

1. Was the power to fix maximum rates given to the Interstate Commerce Commission in 1906 for the purpose of protecting carriers or shippers? Why was there not sufficient protection in the power of the Commission to order carriers to cease and desist from charges that were not fair, just, and reasonable?

2. Why would judicial control of rates not be preferable to control by an administrative commission?

3. Why should orders of the Commission be limited in their operation to a period of two years?

4. What is the importance of the changes made in 1910?

5. Do you think it desirable to authorize the Interstate Commerce Commission to investigate, on its own initiative, with a view to fixing maximum rates, even though there has been no complaint by shippers? Give reasons.

6. Why should an exception be made in favor of transportation that is wholly by water?

7. Why not leave rate-fixing to the operation of the law of supply and demand rather than place it under governmental regulation?

8. In 1909 a shipper asked a Federal court for an injunction restraining the Y railroad from filing a proposed schedule of rates with the Interstate Commerce Commission, on the ground that they were unreasonable. Should the injunction be granted?

9. If, after a hearing, the Commission finds certain rates are unreasonable, can the carrier secure a review of this finding on the ground that the evidence as to unreasonableness was conflicting and that the finding was contrary to the preponderance of the evidence?

290 GOVERNMENT AND RAILROAD TRANSPORTATION

10. On what grounds would an order of the Commission be "set aside by a court of competent jurisdiction"?

11. Why should the right of control over classifications be included in a section on rate-making?

12. An interstate carrier files a new schedule of freight rates which cancels the rate on silk and so excludes it from shipment as freight. Upon the complaint of silk shippers to the Interstate Commerce Commission the railroad contends that exclusion is not classification and so is not subject to control by the Commission. Is this a good defense?

13. What is the importance of paragraph 3, quoted above, in connection with rate-making?

14. Can the Commission establish a new competitive joint route when the time for delivery under an existing route is as short as it would be under the new route?

15. A shipper petitions the Interstate Commerce Commission to establish certain through routes and joint rates, and the Commission refuses to do so. Can a shipper appeal to the courts?

16. A railroad includes in its filed tariffs an allowance of two cents per hundred pounds to all shippers of sugar who cart the sugar in carload lots from the refinery to the railroad station. Is this an allowance "for service connected with such transportation"?

17. Interstate railroads with terminals on the New Jersey shore of New York Harbor established a zone on the New York water front within which they performed free lighterage service to their terminals. A owns a water front within the zone and receives compensation from the B railroad for maintaining a public freight terminal there and lightering freight across to the railroad terminal. A also owns a sugar refinery near the water front, and receives from the B railroad the regular compensation for lightering his own sugar shipments. Other sugar refiners who are outside the free-lighterage zone claim from B a similar allowance for lightering their sugar to the New Jersey terminal. Should the Interstate Commerce Commission grant it? Should it forbid the allowance to A?

18. The tariff rates of railroads serving New York Harbor points included the charge for loading carload freight. Owing to a scarcity of labor during the World War, they notified shippers that the movement of freight would be facilitated if shippers would do the loading themselves. They did so, and applied to the Interstate Commerce Commission for compensation by the railroads for such service. The Commission denied this request on the ground that the arrangement was for the mutual benefit of carriers and shippers. The shippers appeal. Should the decision of the Commission be upheld or overruled?

19. The Union Pacific Railway agreed to pay P one cent per hundred pounds on all grain brought to Omaha from the west on the Union Pacific

and transferred to east-bound carriers through P's elevator. In 1907 the Interstate Commerce Commission ordered the railroad not to pay more than three fourths of a cent per hundred pounds for such elevator services; and in 1908 it forbade any allowance on grain in which P had an interest, if the grain was not reshipped within ten days or if it had been mixed, treated, weighed, or inspected during the process of elevation. Were the orders valid?

20. S is engaged in bringing goods for importers from the place of purchase in Europe to the destination in the United States, charging the importers for transportation and services. The L railroad agrees to pay S \$5000 a year and a percentage upon the published rates for shipping goods over its lines whenever possible. Is this an allowance permitted under the act?

21. Why should the Commission be given any control over allowances made by carriers for services rendered by shippers?

7. INTERSTATE COMMERCE COMMISSION GIVEN POWER TO SUSPEND RATES

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15, paragraph 7. The text given in I. C. Act, pp. 40-42, is in large part as enacted in 1910, but the following changes were made by the Transportation Act of 1920: (1) The word "lawfulness" in the first sentence replaced "propriety." (2) The second sentence took the place of one which read, "If any such hearing cannot be concluded within the period of suspension, as above stated, the Commission may extend the time of suspension for a further period not exceeding six months." (3) "Rate, fare, or charge" was substituted for "rate" throughout the third sentence. The text was further amended by act of March 4, 1927, as follows: (1) In the first sentence "may suspend" was changed to "may from time to time suspend" and (2) "one hundred and twenty days" was replaced by "seven months." (3) The first part of the second sentence through "thirty days, and" is deleted, and the sentence reads, "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare," etc., as at present.]

QUESTIONS

1. Why should the burden of proof be upon the carrier to show that the new rate is reasonable rather than upon a complainant to show that it is unreasonable?

2. The D railroad files higher rates on lumber, to go into effect on March 1. P, a shipper of lumber, complains to the Interstate Commerce Commission, which begins a hearing and suspends the operation of rates. The hearing is not finished within seven months from March 1, and the railroad applies the rates to shipments made by P in October. In November the Commission finds the rates unreasonable and orders a reduction. P seeks to recover the excess charge. The railroad shows that he has already passed this charge on to his customers so that he has suffered no loss. Is this a good defense?

3. Discuss the significance of the changes made in the paragraph by the Transportation Act of 1920 and by the amending act of March 4, 1927.

8. CONTROL OF RATES FOR TRANSPORTATION BY RAIL AND WATER

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 6, paragraph 13 (omitting subdivision (a)), and in the Merchant Marine Act of 1920, Section 8 (I. C. Act, pp. 26-28, 177-178). The provisions of Section 6, paragraph 13, were enacted in substance in the Panama Canal Act of August 24, 1912; but subdivision (a) was considerably rephrased, and in subdivision (c) the words "proportional rates, or maximum, or minimum, or maximum and minimum" were substituted for "maximum" by the Transportation Act of 1920.]

QUESTIONS

1. Explain the necessity of giving the Interstate Commerce Commission the powers granted in paragraph 13 of the Interstate Commerce Act.

2. Construe "or otherwise" at the end of the first clause of paragraph 13.

3. Must rates established under paragraph (b) be just and reasonable within the meaning of Section 1, paragraph 5, of the Interstate Commerce Act?

4. Illustrate by a concrete case the application of paragraph (c).

5. Why should the requirement authorized by paragraph (d) be imposed only in case the water carriers are operating between United States ports and foreign ports? Why should it be imposed in any case?

6. Under what circumstances would it be economically justifiable to establish proportional rail rates for rail-and-water traffic falling within paragraph 13 that would be less than the corresponding local rates? Illustrate. Discuss the advisability of conferring such power as this upon the Interstate Commerce Commission.

[B]

Chicago, Rock Island, & Pacific Railway Company, et al. *v.*
United States of America, et al.

United States Supreme Court (1927), 274 U. S. 29

MR. JUSTICE SUTHERLAND delivered the opinion of the court :

This is a suit to annul, and enjoin the enforcement of, an order of the Interstate Commerce Commission prescribing joint rail-and-water and rail-water-and-rail rates (both hereinafter designated as rail-and-water rates) on cotton from points in Oklahoma, via Galveston and certain steamship lines, to New England destinations. The complaint before the Commission was brought by the Houston Cotton Exchange & Board of Trade and other similar organizations against appellants and a number of other carriers, to have prescribed and established just and reasonable joint through rates on cotton from Oklahoma points through Texas ports to various points of destination in the north-eastern part of the United States and Canada, including New England territory. The modified final order of the Commission required appellants to establish and maintain for the transportation of cotton from Oklahoma points, via Galveston and the lines of the Mallory Steamship Company and the Southern Pacific Company—Atlantic Steamship Lines, to destinations in New England territory, joint rail-and-water rates not exceeding "rates 4 cents per 100 pounds lower than the present all-rail rates from and to the same points," — not, however, lower than \$1.50 per 100 pounds. Prior to the Commission's order, no joint rail-and-water rates on cotton were in effect between the points mentioned. The rate to New York consisted of the local rail rate to Galveston plus the water rate therefrom and a loading charge. To New England points, the rate was made by adding the rail rate beyond New York. The all-rail routes from Oklahoma to the New England territory points are through St. Louis, Memphis, and other Mississippi crossings; and the joint all-rail rates were lower to New England destinations than the combination of local rail-and-water rates. On commodities other than cotton, joint rail-and-water rates were in effect, and these were lower than the all-rail rates. The Commission found that the establishment of joint rail-and-water rates on cotton between the points in question was desirable in the public interest, and that the existing rates for such transportation were unreasonable to the extent that they exceeded or may exceed rates constructed by

the deduction of 4 cents from the present all-rail rates. 87 Inters. Com. Rep. 392; 93 Inters. Com. Rep. 268. The court below, consisting of three judges, after a hearing, entered a decree dismissing the bill for want of equity. 6 F. (2d) 888.

Appellants assign twenty-one specifications of error; but the objections to the Commission's order, so far as necessary to be considered here, may be summarized as follows: (1) The Commission undertook to equalize rail-and-water rates with the all-rail rates, a power which it does not possess; (2) if the order be treated as made under the power to fix reasonable rates, it is arbitrary and without supporting evidence; (3) the result of the order is to short-haul appellants' lines contrary to paragraph 4, Section 15, of the Interstate Commerce Act as amended by Section 418 of the Transportation Act; and (4) the order is based upon paragraph (13) of Section 6, added to the Interstate Commerce Act by the Panama Canal Act of August 24, 1912, chap. 390, 37 Stat. at L. 560, 568, U. S. C. title 49, Section 6, and is, therefore, void because the authority of the Commission was not invoked under that paragraph.

First. Appellants' argument under this head seems to be predicated upon the contention that the order of the Commission established an exact relationship between the rail-and-water rates and the present all-rail rates, the differential of 4 cents being, it is said, the amount charged by insurance companies as a premium for insurance to cover the risk of water transportation; and that an analysis of the Commission's order and report shows that the Commission itself recognized that it was undertaking to make such an equalization. The complaint before the Commission plainly sought the establishment of reasonable rates, and the order of the Commission directed the carriers to discontinue the then existing rates made up of combinations of local rates and substitute the maximum joint rates which were prescribed in the words already stated. The Commission found that rates were and would be unreasonable to the extent they exceeded or might exceed those prescribed. In form, the action of the Commission was responsive to the case made by the complaint, and to hold that, in fact, its order was not one fixing reasonable rates but an order equalizing rates would be to put undue stress upon certain recitals contained in the report, to which our attention is called but which need not be detailed. If these recitals stood alone, they might give plausibility to the contention; but from a consideration of the entire record we think it quite unfair to conclude that the Commission undertook to exercise

an authority entirely different and distinct from that which the complaint specifically invoked. . . .

It is true, the order fixes the rail-and-water rate by relating it in terms to the all-rail rate; but, since we accept the view that the former was, in fact, established as a just and reasonable rate, there can be no objection to the form of words adopted as a method of short and convenient description of that rate. The power of the Commission to equalize rates, if its authority to that end should be invoked, is not involved.

Second. . . . Nothing is to be gained by a review of the evidence. It is enough to say that both the Commission and the lower court thought it was ample to justify the order, and, upon a consideration of the entire record, we find no reason to differ with them in that conclusion.

Third. Does the order of the Commission result in short-hauling appellants' lines contrary to the provisions of paragraph 4 of Section 15 of the Interstate Commerce Act, as amended by the Transportation Act, 1920? The pertinent provision of that paragraph is that the Commission, in establishing a through route, shall not, "except where one of the carriers is a water line," require any railroad carrier to embrace in such route substantially less than the entire length of its railroad lying between the termini of the proposed through route. That the through routes here established by the Commission's order do embrace substantially less than the entire length of appellants' railroads, etc., is not denied. And appellants' contention is that the exception, "where one of the carriers is a water line," has reference only to such a carrier as comes within the description of Section 1 of the Interstate Commerce Act which provides, among other things, that the provisions of the act shall apply to common carriers engaged in "(a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water *when both are used under a common control, management, or arrangement for a continuous carriage or shipment*; . . ." chap. 91, 41 Stat. at L. 456, 474, U. S. C. title 49, Section 1.

Appellees insist that the rail and water lines here involved come within the italicized portion of this provision. But it is unnecessary to pass upon that question, since clearly the order in this respect can be sustained under the later and broader provisions of paragraph (13) of Section 6, added to the Interstate Commerce Act by the Panama Canal Act, *supra*. . . .

This addition to the Interstate Commerce Act materially extends the jurisdiction of the Commission in respect of land and water transportation and the carriers engaged in it, whenever property may be or is transported in interstate commerce by rail and water by a common carrier or carriers; and the obvious intention of Congress would be substantially limited in effect if the . . . provisions were held to be subject to the restriction that both rail and water must be used under a common control, etc. The phrase, "except where one of the carriers is a water line," was introduced in an amendment made to the Interstate Commerce Act by the Transportation Act, 1920, and it is not unreasonable to include within the scope of its reference, the then existing paragraph (13) of Section 6. And this view is strengthened by the consideration that the Transportation Act, 1920, as a part of the new policy which it introduced in respect of the regulation of interstate transportation (*Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case (Akron, C. & Y. R. Co. v. United States)*, 261 U. S. 184, 189, directed the Commission to establish through routes, joint classifications, etc., both in respect of railroad and water carriers, "whenever deemed by it to be necessary or desirable in the public interest," etc. 41 Stat. at L. 485, chap. 91, U. S. C. title 49, Section 15. And the same act declares it to be "the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Section 500, 41 Stat. at L. 499, chap. 91, U. S. C. title 49, Section 142.

These and other provisions emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation in the public interest. It would be quite inconsistent with that broad purpose to adopt the narrow construction of the statutory provisions under review which is advanced by appellants. On the whole, and especially in the light of the definite congressional policy which the legislation reflects . . . we find no difficulty in rejecting the construction thus advanced and adopting that which we have indicated, without, at the same time, doing violence to the fair meaning of the language actually employed.

Fourth. In disposing of the final objection, little need be said. The contention is that the Commission was without power to predicate its order on paragraph (13) of Section 6 of the act, because there is no

formal reference in the complaint to that paragraph nor an order for an investigation under it on the Commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the Commission to consider the case under that provision as well as others; and this is enough. To plead the law relied on, is no more necessary in a proceeding before the Commission than it is in a judicial proceeding.

Decree affirmed.

QUESTIONS

1. Why would it be of any advantage to shippers to have rail-and-water rates from Oklahoma points to New England territory merely equalized with all-rail rates, the all-rail route being more direct and quicker?

2. Could the steamship lines in the principal case have secured the aid of the Interstate Commerce Commission in forcing the railways concerned to make joint rail-and-water rates four cents per hundred pounds less than the all-rail rates?

3. Is there any reason why the railways should have wished to keep the joint rail-and-water rates for cotton proportionately higher than the similar rates for other commodities?

4. What is your opinion as to the power of the Commission to *equalize* rates in a case of this sort "if its authority to that end should be invoked"?

5. Is there any economic justification for maintaining the joint rail-and-water rates of the principal case at approximately the level of the rail rates?

6. Is it sound public policy to promote the use of water carriers?

9. UNDER THE TRANSPORTATION ACT OF 1920

a. SCOPE OF THE COMMISSION'S POWER TO FIX RATES

(1) *In General*

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15, paragraphs 1-7, 13, and 14 (I. C. Act, pp. 37-40, 44). The present text is that of the Transportation Act of 1920. The text of paragraphs 1, 2, 3, and 6 before 1920 is found in IV, I, 6, *supra*. The substance of paragraph 4 was enacted in the Commerce Court Act of 1910; but the Transportation Act introduced the parenthetic exception in the first clause and added the

proviso, besides making several minor changes. Paragraph 5 is entirely new; paragraph 7 in its present form has been considered in IV, I, 7, *supra*; paragraph 13 is old paragraph 8 (see IV, G, 6, *supra*); paragraph 14 was introduced by the Hepburn Act of 1906.]

QUESTIONS

1. Compare paragraphs 1, 2, 3, and 6 above with the corresponding paragraphs of Section 15 as they stood after the act of 1910, and enumerate the changes made by the Transportation Act (see IV, G, 6, *supra*).

2. Why should the Commission be given the power to fix minimum rates?

3. Why should the two-year time limit on rate orders of the Commission be removed?

4. Why is the power to prescribe minimum rates where one carrier is a water line withheld from the Commission?

5. Why should the regulation of transportation wholly by water be denied to the Commission?

6. What is the importance of giving the Commission power *upon its own initiative* to prescribe divisions of joint rates?

7. Is an express company within the protection of paragraph 4 of Section 15?

8. Has the Commission power to require carriers to establish through routes and joint rates with Canadian railways?

[B]

The New England Divisions Case

United States Supreme Court (1923), 261 U. S. 184

[Upon application of the New England railways (except the Boston and Albany and branches of Canadian railways) the Interstate Commerce Commission, acting under paragraph 6 of Section 15, on January 30, 1922, ordered an increase of 15 per cent in the divisions, or shares, of the New England carriers in the joint through class rates on freight moving between that section and the rest of the United States. In March, 1922, the Akron, Canton, and Youngstown Railway Company and other carriers operating west of New England petitioned a Federal district court to enjoin the enforcement of the order and asked to have it set aside as void. The injunction was denied, and the plaintiffs appealed to the Supreme Court.]

MR. JUSTICE BRANDEIS delivered the opinion of the court :

... Plaintiffs urge six reasons why the order of the Commission should be held void.

First. It is contended that the order is void, because its purpose was not to establish divisions just, reasonable and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare *Southern P. Co. v. Interstate Commerce Commission*, 219 U. S. 433, 443. But the order here assailed is not subject to that infirmity.

Transportation Act 1920 introduced into the Federal legislation a new railroad policy. *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 585. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language. . . . And to attain it, new rights, new obligations, new machinery, were created. The new provisions took in a wide range. . . . Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service. . . . Upon the Commission new powers were conferred and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A 5 per cent increase had been granted in 1914 (*Five Per Cent Case*, 31 *Inters. Com. Rep.* 351; 32 *Inters. Com. Rep.* 325); 15 per cent in 1917 (*Fifteen Per Cent Case*, 45 *Inters. Com. Rep.* 303); 25 per cent in 1918 (*General Order of Director General*, No. 28). Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines) if thereby prosperous competitors

earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted; the group system of rate-making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand, the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to some extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent on the value of the property used in the transportation service. *Ex parte 74, Increased Rates, 1920, 58 Inters. Com. Rep. 220. . .*

The deficiency in income of the New England lines in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent was estimated to be necessary to secure to them a fair return. On a like estimate, the increased revenues required to give the same return to carriers in Trunk Line territory was only 29.76 per cent, and to carriers in Central Freight Association territory 24.31 per cent. . . . To have

raised the additional revenues needed by the New England lines wholly by raising the rates within New England — particularly when rates west of the Hudson were raised much less — might have killed New England traffic. Rates there had already been subjected (besides the three general increases mentioned above) to a special increase, applicable only to New England, of about 10 per cent in 1918. *Re Proposed Increases in New England*, 49 *Inters. Com. Rep.* 421. A further large increase in rates local to New England would, doubtless, have provoked more serious competition from auto-trucks and water carriers. For hauls are short and the ocean is near. Instead of erecting New England into a separate rate group, the Commission placed it, with the other two subdivisions of Official Classification territory, into the Eastern group; and ordered that freight rates in that group be raised 40 per cent. At that rate level the revenues of the carriers in Trunk Line and Central Freight Association territories would, it was asserted, exceed by 1.48 per cent what they would have received if they had been a separate group. It was estimated that the excess would be about \$25,000,000.¹ Substantially that amount (besides the additional revenue to be raised otherwise) was said to be necessary to meet the needs of the New England lines.

Plaintiffs insist that Transportation Act 1920 did not, by its amendment of Section 15 (6), change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had theretofore been the Commission's practice to consider all the factors enumerated in Section 15 (6); . . . that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the inquiry into divisions on the Commission's initiative; that this authority was conferred in order to protect the short lines, which, because of their weakness, might refrain from making complaint, for fear of giving offense; . . . and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by Section 400 of Transportation Act 1920, which declares that they shall establish "in case of joint rates . . . just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that Section 12 of the act of June 18, 1910, chap. 309, 36 Stat. at L. 539, 551, 552, which first conferred upon the Commission authority

¹ Estimated on the volume of traffic moving in 1919.

to establish or adjust divisions, . . . did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates. . . . The extent of the Commission's power was a subject of doubt; and Transportation Act 1920 undertook, by Section 15 (6), to remove doubts which had arisen. But Congress had, also, the broader purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new Section 15 (6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carrier"; . . . just as, by new Section 15 (3), p. 485, the Commission is authorized, upon its own initiative, when "desirable in the public interest," to establish joint rates and "the divisions of such rates."

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate, and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined not by an agreement of the parties or by mileage. It is to be fixed by the Commission, — fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate-making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

What the Commission did was to raise the additional revenues needed by the New England lines, in part directly, through increase of all rates 40 per cent, and, in part indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect, tax. It is

not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the Western carriers. All is paid by the community, pursuant to the single rate increase ordered in Ex parte 74. If, by a single order, the Commission had raised joint rates throughout the Eastern group 40 per cent, and, in the same order, had declared that 90 per cent of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in Ex parte 74 was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders instead of one is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in Ex parte 74.

Third. It is asserted that the order is necessarily based upon the theory that, under Section 15 (6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the Commission did not base its order upon any such theory. The order directs a 15 per cent increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission assumed was typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier. Whether the assumption was well founded will be discussed later. Here we are to consider merely, whether Congress authorized the methods of proof and of adjudication pursued, and whether it could authorize it, consistently with the Constitution.

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that

Congress knew this; and that it knew also that the Commission had been confronted with similar situations in the past, and how it had dealt with them.

For many years before the enactment of Transportation Act 1920 it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. . . . This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by act of June 18, 1910, chap. 309, Section 12, 36 Stat. at L. 539, 551, 552, to be upon the carrier. [Many cases are cited.] Thus, the practice did not have its origin in the group system of rate-making provided for in 1920 by the new Section 15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries; . . . and we must assume that Congress intended to confer upon the Commission power to pursue it. . . .

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due-process clause, create rebuttable presumptions (*Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61), and shift the burden of proof (*Minneapolis & St. L. R. Co. v. Minnesota*, 193 U.S. 53). It might, therefore, have declared in terms, that if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U.S. 563, 579, serious injustice to any carrier could be avoided by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

Fourth. It is asserted that the order directs a transfer of revenues of the Western carrier to the New England carriers, pending a decision

in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the order is void. The argument is, that under Section 15 (6), the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust, unreasonable, or inequitable; that in such event it shall prescribe divisions which are just, reasonable, and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one. Whether a hearing was full must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing. . . .

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant, under such circumstances, immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury of the carriers. That the order is not obnoxious to the due-process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

Fifth. It is contended that the order is void because it confines itself to dealing with the main, or primary, divisions of the joint rates at the Hudson River, and fails to prescribe the subdivisions of that part of the rate which goes to the several carriers. . . . There was, thus, on the part of the Commission, neither usurpation of power nor neglect of duty, in limiting its definite decision to the primary divisions at the Hudson River gateways, and leaving the interested parties to deal, in the first instance, with the subdivisions among the carriers in their respective territories. . . .

Sixth. It is contended that the order is void, because it is unsupported by evidence. . . . That the evidence was ample to support the order made is shown in the opinion of the lower court (282 Fed. 306, 308, 309), and in the reports of the Commission. . . .

Affirmed.

QUESTIONS

1. "The 1920 Act sought to insure adequate transportation service." What is there in the text of the act to justify this statement?

2. What were the "new rights, new obligations, new machinery," created to attain this new purpose?

3. Why would a division of joint rates on the basis of mileage not be economically sound?

4. Would either the "group system of rate-making" or the "division of joint rates in the public interest" have worked without the other?

5. Which is the more defensible from an economic standpoint: to aid weak roads by furnishing them with capital taken from their competitors or to aid them by reducing the share of connecting lines in joint rates on through traffic?

6. How can it be just to a prosperous carrier to give it a smaller share of an increased rate than of the original rate?

7. The K. C. Railway shows that the public interest demands its continued operation and that its revenues are insufficient, under efficient management, to pay operating expenses, and asks the Interstate Commerce Commission to give it a larger share of the joint rates, fares, and charges on traffic interchanged by it with thirteen carriers whose lines directly connect with it. The Commission orders that the divisions received by the thirteen carriers be reduced by percentages varying from 10 to 30 per cent, the amount of the reductions going to the K. C. road. The thirteen carriers ask that the order be enjoined on the following grounds: (1) that the same percentage of reduction should apply to all of them; (2) that other carriers participating in the joint rates, though not connecting directly with the K. C. road, should have been made parties to the proceedings before the Commission and should share in the reductions; and (3) that the Commission was guided solely by the relative financial ability of the several carriers, as shown by the transfer of varying percentages from the connecting carriers to the K. C. instead of the flat increase of the latter's divisions, as in the New England case. Should the injunction be granted?

[C]

United States War Department, Inland Waterways, Mississippi-Warrior Service *v.* Abilene & Southern Railway Company et al.

Interstate Commerce Commission (1923), 77 I. C. C. 317

[For the statutes relating to the inland waterways see IV, *Q*, *infra*.]

EASTMAN, *Commissioner* :

. . . Complainant, hereinafter called the barge line, operates on the lower Mississippi and Warrior rivers barge lines which are owned by the Federal government. . . .

It is alleged in No. 11893 that the divisions accorded the barge line out of the joint rail-and-barge and rail-barge-and-rail rates in which it participates with defendants, and certain rules, regulations, and practices connected therewith, are unreasonable, inequitable, and unduly prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. We are asked to require defendants to establish and apply, during the period subsequent to August 26, 1920, and for the future, a basis of divisions of joint rates, and rules, regulations, and practices relating thereto, which will be just, reasonable, and nonprejudicial, and to establish and put in force through waybilling arrangements in connection with such joint rates. Throughout this report the term "rail-and-barge" will be used as descriptive of rates or routes where the movement is made up of two parts, one by rail and the other by barge, whichever precedes. . . .

In No. 13290 it is alleged that by reason of defendants' refusal to establish with the barge line through routes and joint rail-and-barge and rail-barge-and-rail rates to the full extent that there are now in effect through all-rail routes and joint rates, including rules, regulations, transit privileges, etc., which apply via the lines of rail carriers operating between ports served by the barge line, the various communities to and from which such joint rates are not now in force via the barge line, and the shippers and receivers of freight there located, are unjustly discriminated against and unduly prejudiced and other communities to and from which such joint rates are in force via the barge line enjoy an undue preference, in violation of Section 3 of the Interstate Commerce Act. It is also alleged that the rates maintained by the barge line from port to port plus the separately established rates maintained by defendants between said ports and interior points to

and from which joint rates via the barge line are not now in effect, if applied on through rail-and-barge movements, would result in aggregate charges that are unjust and unreasonable, in violation of Section 1 of the act, and prohibitory of such through movements because greatly in excess of the established rates over the all-rail routes. We are asked to establish and put in force the desired through routes and joint rates, including such rules, regulations, and practices as may be necessary, with reasonable and fair divisions to the barge line. The through routes described cover practically the entire country, and are sought in all cases where there are now through all-rail routes made up in part of a rail line between ports served by the barge line. Joint rates made differentially lower than the corresponding all-rail rates are desired, and divisions upon the plan proposed by the barge line in No. 11893. . . .

[That portion of the report which deals with No. 11892 is omitted; the complaints related to demurrage, switching, and other terminal charges.]

For at least twenty years prior to the operation of the barge line there was no common carriage of consequence on the lower Mississippi. Investment in boat lines was no doubt deterred to some extent by the readiness with which competing rail lines cut rates to meet even potential water competition. The recurring periods of rail congestion and shortage of equipment, however, gradually stimulated interest in the development of inland waterways, including the Mississippi River. During the acute traffic conditions in the Mississippi Valley in the winter of 1917 the commercial interests of New Orleans, Louisiana, and St. Louis, Missouri, undertook the formation and financing of a corporation to build a number of towboats and barges for operation between St. Louis and New Orleans. Due to war conditions they were unable to secure the steel necessary for the purpose. After the passage of the Federal Control Act in 1918 an appeal was made under the provisions of Section 6, which authorized the president to "expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways. . . ."

A committee appointed by the Director General of Railroads to investigate and report recommended the utilization of the lower Mis-

Mississippi River and the so-called Warrior River waterway. The utilization of the latter was to provide service between the Alabama coal and ore districts and the ports of Mobile, Alabama, and New Orleans. Both projects were authorized in modified form in June, 1918. In the following month a Federal manager was appointed and instructed to commandeer and put in operation as soon as possible all available equipment on both waterways capable of being used for the transportation of freight, and also to proceed with the construction of a new fleet authorized by the Director General.

The Transportation Act, 1920, transferred the barge line from the railroad administration to the Secretary of War, and provided that the latter should "operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued. . . ." It also made the barge line subject to the Interstate Commerce Act to the same extent as if privately owned and operated.

The Mississippi River service is between St. Louis and New Orleans and the barges also touch at East St. Louis and Cairo, Illinois, Memphis, Tennessee, and Vicksburg, Mississippi. The barge line makes no attempt to serve the smaller river landings.

The Warrior River service is between Cordova and Birmingham, Alabama, on the Black Warrior River, and New Orleans, Mobile, and the intermediate river ports of Demopolis and Tuscaloosa, Alabama. . . .

Port-to-port rates were established by the railroad administration upon the inauguration of water service and in all instances were made 80 per cent of the corresponding all-rail rates, except that on coal from points on the Warrior the differential was made 20 cents per ton, or substantially less than 20 per cent. The purpose of the differentials is to attract traffic to the barge line, and they were apparently based, not so much upon estimated economy in operation compared with rail service, as upon the difference in the value of the service to the shipper, the barge service being less convenient and much slower than the rail service. The barge-line management thinks experience has shown that the differentials could not without loss of traffic be made any less. . . .

The record contains many comparisons with differentials maintained by other water lines. There is no uniformity in these differentials; some are relatively smaller and some relatively greater than the differentials of the barge line. It is also evident that the service afforded by the barge line is in no way comparable with the service afforded by ocean or lake steamships.

310 GOVERNMENT AND RAILROAD TRANSPORTATION

Roughly speaking, joint rates with rail carriers now apply as follows :

Mississippi River Service

Between New Orleans and points in	Via
Arkansas and Mississippi	Vicksburg
Arkansas, Missouri, Kentucky, Tennessee, Kansas, Indiana, and Ohio	Memphis
Missouri, Iowa, Nebraska, Minnesota, Wisconsin, Illinois, Indiana, and Michigan	St. Louis
Illinois	Cairo
Between St. Louis and points in	
Arkansas, Louisiana, and Mississippi	Memphis
Louisiana and Mississippi	New Orleans
Between Memphis and points in	
Missouri, Illinois, Indiana, Iowa, Minnesota, and Wisconsin	St. Louis and East St. Louis

Warrior River Service

Between New Orleans and points in	
Alabama and Mississippi	Mobile
Mississippi, Alabama, Georgia, and Tennessee	Cordova, Birmingham, and Tuscaloosa
Between Mobile and points in	
Mississippi, Alabama, Georgia, and Tennessee . . .	Cordova, Birmingham, and Tuscaloosa

The territory covered by the joint rates in Kentucky and Tennessee is limited, and only a few points in Kansas, Nebraska, and Georgia are reached. . . . With one exception, all of the joint rates established were made differentially lower than the corresponding all-rail rates by the amount of the port-to-port differential. . . .

The barge line lays stress upon the fact that the practical elimination for many years of service by water has created conditions which make joint rates with connecting rail carriers of unusual importance to the maintenance of its service. . . .

Present Divisions

In dividing the original joint rail-and-barge rates which became effective via the St. Louis gateway in March, 1919, the railroad administration adopted the principle that the rail lines should receive the same revenue as they would receive if the traffic moved all rail via the same gateway. It was felt that the barge line should bear the whole burden of the differential between the rail-and-barge and the all-rail rates. . . .

On December 15, 1919, after the extension of the rail-and-barge

service, the barge line was advised by the director of the division of inland waterways of a proposed new basis of divisions in connection not only with the new joint rates but with those previously authorized, as follows : . . .

(a) Where the water-and-rail route is not in competition with a rail route, each carrier to receive its local rate. The expense of transfer, over and above that which would occur as between rail carriers, to be assumed by the water line.

(b) If joint rates are established in connection with the water lines via junctions where divisions of the all-rail rates are effective, the rail carrier shall receive its proportion of the all-rail rates as arrived at by such division. The expense of transfer, over and above that which would occur as between rail carriers, to be assumed by the water line.

(c) Where all-rail rates are in effect between the points to be served by the water-and-rail routes, and the all-rail rates do not divide at the junction with the water line, the revenue of the rail line shall be determined as follows :

(1) The rail lines shall receive beyond the nearest prorating point their established proportions of the all-rail rates.

(2) From the point at which freight is delivered to, or received from, the water line up to or from such junctions, the rail carriers shall receive as their proportion a division of the remainder of the all-rail rate worked out on the short rail route between the points, and, for this purpose, these short-line mileages shall be divided on forty-mile blocks with an additional forty miles for terminal. The rail portion of the rail-and-water route shall receive the number of blocks represented by the distance to and from the water carrier, plus the forty-mile terminal.

(3) Before determining divisions, as outlined above, where it is customary to deduct arbitraries, before prorating in the division of the all-rail rate, such arbitraries are to be deducted and added to the proportions of the all-rail lines.

(4) In figuring percentages on block basis, above outlined, a minimum of 25 per cent shall accrue to either line.

(5) The expense of transfer, over and above that which would occur as between rail carriers, to be assumed by the water line.

The barge line on February 5, 1920, protested against this basis of divisions, but it became effective on March 1, 1920, and has since remained in force. . . .

Every paragraph of the foregoing basis is criticized by the barge line. . . . [The details of this criticism are omitted for lack of space.]

The Barge Line's Proposal in No. 11893

In lieu of the present plan, the barge line asks that we establish the following basis for dividing the joint rail-and-barge and rail-barge-and-rail rates which are now in effect and which it seeks to have established, and for apportioning the expense at transfer points: . . . [The text of the plan is omitted, but the essence of that portion which deals with the determination of divisions is given in the following paragraph.]

The foregoing plan contemplates the establishment of divisions on what is known as the mileage-prorate basis, using actual distances of the rail lines from and to the points of interchange and certain constructive distances for the barge line. The constructive mileages were arrived at by taking 80 per cent of the average distances by rail over several practicable routes, in each case, between the various ports and stating the results thus obtained in the nearest multiple of 25. In all cases they are materially less than the actual distances traversed by the barges from port to port. Thus, the constructive mileage between St. Louis and New Orleans is 600 miles, while the minimum distance by water is 1153.6 miles. Between Birmingham and New Orleans the constructive mileage is 325 miles, while the minimum water distance is 584 miles.

From the use of these constructive mileages some misunderstanding has arisen as to the purpose which they are intended to serve. It has been rather generally assumed that they represent an attempt to equate the cost of service by barge with the cost of service by rail, upon the theory that the cost of rail transportation for the constructive distance is equal to the cost of barge service for the actual distance. It does not appear that they have been based upon such a theory. On the contrary, study of the barge line's proposal leads to the conclusion that it is really founded upon a modification of the theory which underlies the division basis of the railroad administration. Under that plan the rail carriers were to receive the same divisions in amounts as they would receive if the traffic moved all rail. The effect of the barge line's proposal is to give the rail lines what it deems would be fair and reasonable divisions if the traffic moved all rail.

Stating the matter differently, the essence of the barge line's position is that it does not believe that the divisions which the rail lines are now receiving in many cases are fair and reasonable divisions all rail. The basis for this belief has already been indicated. It relates particularly to the ports which are not now favored points

of interchange between rail carriers and where the divisions are frequently the local rates, and sometimes exceed such rates. Confronted by such divisions, which it regards as extortionate, the barge line has attempted to devise a method, simple and easily applied, for determining divisions fair to the rail lines either on all-rail or on rail-and-barge traffic.

In devising this method, the barge line seems to have started with the fact that divisions between rail lines are often based on mileage. The central-territory lines say that they are in general so determined at St. Louis and Cairo. Applying the same principle to the other gateways, the barge line assumes that fair all-rail divisions would be determined by mileage; but to figure rail divisions in this way and then deduct them from the differentially lower rail-and-barge rates to determine the barge line's divisions would be an awkward process. In order that the mileage method may be applied directly to the differentially lower rate, therefore, the barge line uses for the factor between the ports approximately 80 per cent of the average all-rail distance, corresponding to the 80 per cent port-to-port rate which the barge line maintains in comparison with the rail rate between the ports. . . .

The Barge Line's Proposal in No. 13290

. . . It is the barge line's position that it cannot live on port-to-port traffic alone, and that the economical form of transportation which it provides ought for the good of the country to be opened to public use as widely as possible by the extension of the system of joint rates.

The complaint in No. 13290 practically covers the entire country and asks for joint rates wherever there is an open through all-rail route made up in part of a rail line between ports served by the barge line. . . .

Defendants' Evidence in No. 11893

The defendant rail carriers, with one accord, protest that they are not hostile to the barge line, and that their attitude since its inception has been one of proper coöperation. They feel strongly, however, that it is but just and fair that the barge line should undertake to be successful on its merits and not at the expense of its rail connections, and that the "waterway ought to be used where it constitutes a real contribution to the national economy, but ought not to be used where the contrary is the case." The cardinal principle which they urge

with respect to the divisions in question is that which the railroad administration attempted to follow, namely, that the rail carriers shall accept the same divisions on traffic interchanged with the barge line as they receive on similar traffic interchanged with rail connections, the additional expense, if any, of interchange with the barge line to be borne by the latter.

Judged by this cardinal principle, defendants say that existing divisions are fair and reasonable, but they also contend that the burden of proof to show the contrary is upon the barge line and that it has wholly failed to sustain this burden. . . .

All of the defendants stress the advantages which the barge line has in cost of operation. Terminals, both as a matter of capital and of operating expense, are a great and continually increasing burden upon the rail lines of the country. The barge line has no like expense, its terminals and warehouses being principally owned by the port cities, which charge nominal rent. Moreover, the river is its roadbed, the expense of keeping it navigable is borne by the government, and it has no taxes to pay. We are asked to note that no cost data have been submitted which would enable us to compare the cost of hauling freight per unit by barge with the similar cost by rail.

The rail carriers not only defend existing divisions at the St. Louis and Cairo gateways, but they also, with certain exceptions which we shall later note, defend the frequent exaction of local rates as divisions at the other Mississippi or Warrior ports. It is a matter of indifference, they point out, to the lines operating in central and western trunk-line territories, whether the haul south of the gateway is by barge or by rail; but between points in southern territory the situation is quite different. Much of the latter traffic in which the barge line seeks to participate could move between origin and destination over a single rail line. When part of the haul is by barge there is a distinct and positive loss to the Southern rail carriers and an additional terminal expense which would not otherwise be incurred. While the law now permits us to compel the establishment of through routes between rail and water carriers which short-haul the rail carriers, it does not require us, defendants claim, to establish such routes unless we deem them in the public interest; nor are we estopped, when they are established, from taking the sacrifice on the part of the rail carriers into consideration in the fixing of just divisions.

With further reference to local-rate divisions, defendants say that many of the rail lines reaching such ports as Memphis, Vicksburg, and

more particularly the ports on the Warrior are branch lines, built as pioneer projects, operating under unfavorable conditions, and designed to feed the main rail lines. Why, they ask, when such lines are diverted from their original purpose and converted into feeders of the barge line, should this fact not weigh in the fixing of divisions? And why should the high cost of operation over such lines be ignored? The haul to the port for delivery to the barge line is in fact, they claim, no less expensive than the haul to which their local rate applies. . . .

The barge line's proposed new basis of divisions would result, defendants feel, in great injustice to them. The constructive mileages used between the ports are, in one or two cases, greater than the short-line rail distance, but aside from this fact they contend that the proposal is a scheme for prorating divisions on the basis of mileage without consideration of terminal service, density of traffic, or other factors which must be considered if justice is to be done. They illustrate this by the fact that while density of traffic is normally greater on the east side than on the west side of the Mississippi River, and still greater in central and western trunk-line territories, yet under the barge line's proposal mileage is in every case to be given the same weight in the fixing of divisions. . . .

Voluminous exhibits were submitted by defendants to show the effect of the barge line's proposal. In many cases it would afford the rail lines lower ton-mile earnings for the short hauls to the ports than if they carried the traffic all rail to destination. This is especially true in cases, which they say are frequent on the Warrior route, where the rail-and-barge haul is particularly circuitous in comparison with the all-rail haul. In some cases the barge line's division, under its proposal, would be greater than its local rate between the ports. In many more cases its proposal would reduce the existing rail division by an amount greater than the differential in the rail-and-barge rate. This, defendants say, is proof that the barge line is asking the rail carriers to bear the burden of the differential. . . .

Defendants' Evidence in No. 13290

... Elaborate analyses of the proposed through routes and joint rates were submitted, showing that in many cases rail-barge-and-rail routes are proposed, and in some cases rail-and-barge routes, where the rail portion of the joint haul would be longer than the short-line all-rail route. Such through routes, they contend, particularly if a joint

rate lower than the all-rail rate is to be applied, are plainly wasteful of transportation and economically unsound.

They further show, by these analyses, that in many cases the proposed joint rates, constructed on the differential basis, would result in violations of the fourth section. In other words, the joint rail-and-barge rate would be lower than the rail rate between the interior point and the port of interchange. Another most serious result, they claim, would be the disruption of long-standing and delicate rate relationships. . . .

Another curious result, if the differential rates sought were applied to the through routes proposed, would be that they would be higher in some instances for shorter than for longer hauls. . . .

Conclusions

These complaints are vast in their scope, covering as they do the divisions of thousands of existing joint rates, the establishment of thousands of proposed through routes and joint rates, the complicated switching movements and charges at several large ports, and various incidental but nevertheless troublesome questions. To a large extent they raise questions which in many of their aspects are novel, involving the relations between rail carriers and an experimental form of water service. In our judgment the best disposition of these complaints for the present is to state our conclusions as to the general principles which should control the decision of the issues. The application of these principles through specific orders to the multitudinous situations which are covered by the complaints is a task which we ought not to be compelled, in the first instance at least, to undertake. The rail carriers and this new enterprise which is owned and operated by the government ought to be able, with such help as we can give them in this way, to compose their differences in friendly negotiation, and we have faith that they will be able to do so. The proceedings before us, however, will not be closed, but will be kept open for further and more specific action, if that proves necessary. . . .

The Mississippi-Warrior service is owned and operated by the government, as we understand the situation, not necessarily as a permanent governmental undertaking, but to test the possibilities of transportation by barge upon these great inland waterways. In view of the experience that the country has had with recurrent rail congestion and car shortages and with increased rates, the possibilities which

these waterways offer as a means of adding to the sum total of transportation facilities and of providing a cheaper form of carriage are plainly of prime public importance. Clearly everything that can be done ought to be done to give this experiment a fair opportunity to demonstrate its worth, and in this endeavor the project should be viewed in the light of the service which can reasonably be anticipated and without permitting vision to be obscured by the difficulties and embarrassments which surround every new enterprise and particularly one which has been compelled to start life with a heritage of worn-out and inadequate facilities. On the other hand, it is equally clear that the experiment will not be fairly conducted if the barge line is permitted to tap the resources of the rail lines by depriving them in any way of just compensation for the services which they perform in connection with its operation.

Divisions

Turning first to divisions, no formula has yet been devised, so far as we are aware, which can be uniformly and justly applied under all circumstances to determine the fair divisions between rail lines of joint rates, and still less when one of the participating carriers is a barge line. We are unable to approve the formula which has been suggested in No. 11893 by the barge line. Although based on rail mileages between ports rather than on barge mileages, it is essentially a plan for dividing rates by using distance proportions and without giving adequate consideration to terminal expense, varying densities of traffic, varying difficulties of transportation, and other similar factors which affect a just division.

Nor have we evidence which would enable us to apportion rates, either singly or by ports or by territorial groups, in accordance with the relative costs of rail and of barge transportation. As the barge line suggests, its own costs per unit of freight handled are largely dependent upon the amount of traffic handled. Obviously the only feasible approach to the determination of fair divisions, under the circumstances, is the one which was used by the railroad administration. As a basic proposition, we accept in the main the principle that the rail lines should receive the same revenue as they would receive if the traffic moved all rail via the same gateway. However, the attempt to apply this principle has, we believe, shown that it is subject to certain important qualifications. It goes without saying that, if the division

received by a rail carrier on traffic moved all rail by the same gateway can be shown to be excessive, it will ordinarily be excessive when applied to rail-and-barge traffic. But aside from this, it does not necessarily follow that if the all-rail division is fair, it is under all circumstances a fair division for rail-and-barge traffic. . . .

While the law does not permit us to require rail carriers to establish through routes which result in the short-hauling of one carrier which has a reasonably direct route of its own, it is, perhaps, not a necessary conclusion, when such routes and joint rates are established, that local rates are fair divisions for the carrier which is short-hauled. However, the law now authorizes us to require the establishment of through rail-and-water routes and joint rates which short-haul a rail carrier, and the reasons are evident. If a water route were dependent for feeders upon rail lines which can deliver traffic to it without short-hauling themselves, it would draw little traffic from the interior except at ports, like St. Louis, which happen to be a meeting point of rail lines serving different territories. Carrying this thought to its logical conclusion, if the rail lines of the country were owned by a great many independent companies, the water route would have a liberal supply of feeders; but if the rail lines were all one consolidated system, it would be wholly deprived of feeders. Yet its status as a useful and economical means of transportation would be the same in the one event as in the other.

Clearly the usefulness of water routes to interior points ought not to be dependent upon the extent to which rail lines are consolidated, and Congress has wisely recognized this in the law. It follows, whatever may be the case as between rail lines, that joint rates over rail-and-water routes ought to be divided without regard to the extent to which rail carriers may be short-hauled, and not upon a plan designed to discourage or render impracticable the use of such joint rates. The record shows that the exaction by rail lines of their local rates as divisions under such circumstances has for its admitted purpose the protection of the long haul. In other words, it is a means of accomplishing indirectly what Congress, in the law respecting the establishment of through routes and joint rates, has sought to prevent. Nor do we believe that the rail lines will in the long run suffer in such situations from more liberal divisions to water carriers. . . .

And this leads to consideration of the character and purpose of joint rates. A line participating in a joint rate does not prove that it is entitled to a division equal to its local rate by showing that the service which it performs in connection with the joint haul is no less expensive

than its local service. That may be a reason why a joint rate lower than the combination of locals should not have been established, but it does not demonstrate that the carrier should have an amount equal to its local as its *fair share* of the joint rate which has been established. Nor does it prove, necessarily, that the joint rate should not have been established. As was said in *Chattanooga Packet Co. v. I. C. R. R. Co.* [33 I. C. C. 384], at page 392: "It is a generally accepted principle of rate-making, which has frequently found expression in the Commission's decisions, that through rates should be less than the sum of the intermediate rates."

This is a principle which, like other principles of rate-making, is not wholly dependent upon immediate costs of service. It looks also to the future and recognizes that such joint rates stimulate commerce and business and induce a flow of traffic which in itself has a tendency to lessen the cost of service. This thought has particular force in the situation here presented. The barge line is a new and experimental project. It is attempting to induce a flow of traffic through gateways some of which have heretofore been little used for corresponding rail movements. If it is successful in this experiment, the rail lines feeding into these gateways will gain an importance and a strength which they do not now have, and the cost of service will be reduced. This is especially true of the new gateways on the Warrior River.

We are therefore not persuaded, in the instances where the present rail divisions of the rail-and-barge rates are equal to or exceed the local rail rates, that the barge line is being fairly treated, nor, indeed, that it is being fairly treated in all other situations. How the divisions should be changed in such cases is a more difficult question, but we are impressed by the offer of the Alabama & Vicksburg and the Vicksburg, Shreveport & Pacific. These lines are viewing the problem as feeders rather than as competitors of the barge line. . . . They are willing to divide on a rate-prorate basis, using the rail class rates between the interior point and the port of interchange and the rail class rates between the port of interchange and the port of origin or destination as factors. The record also shows that in many cases where the present rail divisions are divisions upon which traffic really moves they are lower than a rate-prorate plan would fix. . . .

It is our judgment upon the facts presented that such a rate-prorate basis may properly be used as a rough test of fair divisions. It will not always operate fairly, for one factor or the other may be out of line. Thus the rate between the interior point and port of interchange

may be a combination rate, or it may be a rate which for some reason is either elevated above or depressed below the normal level. But upon the whole the basis suggested is one, we think, which affords a useful test.

Aside from the matter of divisions which exceed, equal, or approach local rates, the division plan devised by the railroad administration and now being followed is objectionable in many ways. Not only are certain of its provisions open to varying interpretations, but it is cumbersome and difficult and costly of application. Moreover, the record shows that even those rail divisions which are less than local rates and which were designed to accommodate and encourage rather than to discourage the movement of traffic are often inconsistent one with another. In our opinion a committee representing the rail carriers and representatives of the barge line ought to be able to meet in conference and negotiate divisions which will be reasonably free from such inconsistencies and which may be reduced to percentages which can be published in the form of new division sheets applicable to rail-and-barge and rail-barge-and-rail traffic. The general principles which should guide these negotiations we have indicated in part and they may be restated as follows :

1. The problem is to determine the *fair share* which each participating carrier should receive of the joint rates which have been established.

2. As a basic principle, it is fair that the rail lines should receive the same revenue as they would receive if the traffic moved all rail by the same gateway ; but this principle is subject to qualifications.

3. The rail lines are not fairly entitled to the same divisions as they would receive all rail where those divisions have not been largely determined by the relative amount and cost of the service rendered, but in substantial part by considerations extraneous to the service, such as protection of the long haul, diversion of the traffic to other gateways, etc.

4. A greater degree of uniformity or consistency in the divisions received by the rail lines is desirable, even in the cases where those divisions have apparently not been influenced by extraneous considerations.

5. In determining the fair divisions of the rail lines, two tests may properly be applied : First, the general level at the gateway of divisions of joint all-rail rates upon which traffic moves in reasonable volume, in other words, of the rail divisions which are designed to accommodate and encourage rather than discourage the movement of traffic ; and second, the results derived from the application of a rate-prorate

basis, using as factors the first-class rail rate between the port of interchange and the interior point and the first-class barge rate between the port of interchange and the port of origin or destination.

6. The aim should be, after applying these tests, to attain a reasonable degree of uniformity and consistency in the rail divisions at each gateway, and then reduce them to percentages which may be published in new division sheets. . . .

New Through Routes and Joint Rates

Coming finally to the issues in No. 13290, in this case the barge line has, we believe, attempted to lay upon us a wholly unreasonable burden. It has sought the establishment of further through rail-and-barge and rail-barge-and-rail routes and of joint rates thereover made differentially lower than the corresponding all-rail rates, in a petition countrywide in its scope and embracing literally thousands of proposed routes and rates. Upon argument the barge line concedes that many of these proposed routes and rates cannot justly be required, and it asks us to exercise our good judgment in selecting those which should be required. The evidence is not sufficient to enable us to undertake this task, and we can only indicate, as we have done in the case of divisions and switching charges, our conclusions as to the general principles which ought to guide in determining what further through routes and joint rates, if any, ought to be established.

1. We are left in doubt by the record as to whether further rail-barge-and-rail routes are in the public interest. It may be that they are desirable in certain cases, but we feel that the barge line has not sustained the burden of proof in this respect.

2. We are not persuaded that further rail-and-barge routes should be established where the degree of circuitry would be excessive, nor where the barge line's share of the joint haul would be so short that interchange expense would offset the lower cost of water transportation. . . . With respect to both of these matters, it seems impossible to lay down any rule which is not arbitrary in some degree. Until the contrary is clearly shown, however, we are of the opinion that no rail-and-barge route should be established where the short-line rail distance via the port of interchange between the interior point and the port of origin or destination exceeds by more than one third the short-line rail distance over the most direct route, nor where the short-line rail distance between the interior point and the port of interchange exceeds two thirds

of the short-line rail distance between the interior point and the port of origin or destination. Inasmuch as this rule is arbitrary, it ought not to be too rigidly applied, in disregard of competitive or commercial conditions.

3. The record leads to the conclusion that there are additional rail-and-barge routes which would not be open to the objections mentioned above and which ought to be established. It further indicates, however, that if such additional routes are established it will probably be necessary for the barge-line management to modify in some respects its plan of differential joint rates. So long as the barge line bears the burden of the differential and does not seek to impose it, in whole or in part, upon the rail lines, it may be given considerable latitude in fixing the amount; and under the principles which we have outlined for the fixing of divisions, the burden of the differential would, in our opinion, be borne by the barge line. But under the proposed plan, which makes the differential in all cases 20 per cent of the all-rail port-to-port rates, the results would often be incongruous and in some cases in violation of the fourth section. Moreover, insufficient thought seems to have been given to the possible disruption of established rate relationships. . . .

One final word. We have endeavored to state, as explicitly as the record will permit, our conclusions as to the general principles which should guide in the settlement of the issues which are raised in the barge line's three complaints. With this help, it is our hope and belief that the rail carriers and the barge line will be able to compose their differences in friendly conference and negotiation. It may be that not all the controverted matters can be disposed of in this way, but surely the number can be reduced, so that if it develops that a further appeal to us is necessary the issues may be made more simple and specific than those which are now presented.

QUESTIONS

1. What are the economic advantages of water transportation over rail transportation? of rail transportation over water transportation?
2. For what kinds of traffic would it in general be practicable to use water transportation (in whole or in part) instead of rail transportation, when an all-rail route exists?
3. What do you think were the "conditions which make joint rates with connecting rail carriers of unusual importance to the maintenance of its [the barge line's] service"?

4. What arguments are there for making the barge line bear the whole burden of the differential between the rail-and-barge rates and the all-rail rates?

5. Work out concrete examples showing the application of the various rules of the order which became effective on March 1, 1920.

6. What objections to the order of March 1, 1920, do you see?

7. Show by examples why a mileage basis for dividing rates would not always be just, either as applied to all-rail routes or to rail-and-water routes.

8. Illustrate the statement of the Commission that "it does not necessarily follow that if the all-rail division is fair, it is under all circumstances a fair division for rail-and-barge traffic."

9. Illustrate the rate-prorate proposal of the Alabama & Vicksburg Railway. Would the modification proposed by the Commission in their fifth principle be more favorable to the barge line or less?

10. Illustrate the application of the tests suggested by the Commission to determine the desirability of new rail-and-barge routes.

[D]

Ex Parte 94

Interstate Commerce Commission (1928), 148 I. C. C. 129

EASTMAN, *Commissioner* :

This proceeding was instituted upon our own motion for the purpose of securing the views of interested parties with respect to the meaning and purpose of the provisions of Section 2 (*e*) of the act of May 29, 1928, and also with respect to the procedure which we should follow thereunder, particularly with reference to the extent to which the public hearings are required.

Counsel for the Inland Waterways Corporation, the Association of Railway Executives, and interested shippers or organizations thereof presented their views upon these matters to us orally on October 12, 1928, and thereafter filed briefs.

Section 2 (*e*) of the act in question reads as follows: . . . [The text of this will be found in IV, *Q*, *infra*.]

Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. *United States v. Standard Brewery*, 251 U.S. 210. If that be plain, resort to extraneous sources of information is inadmissible. But where the

statute is capable of two constructions or its meaning is otherwise obscure, resort may be had to reports of legislative committees. . . .

And where doubts as to the meaning exist, the courts may also be guided by a principle of statutory construction which was stated in *St. Louis S. W. Ry. v. Arkansas*, 235 U.S. 350, 369-370, as follows :

No canon of construction is better established or more universally observed than this, that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. *United States v. Coombs*, 12 Pet. 72, 76; *Grenada County Supervisors v. Brodgen*, 112 U.S. 261, 269; *The Japanese Immigrant Case*, 189 U.S. 86, 101.

Moreover, in seeking the meaning of a statute from the language employed, context and the design and purpose of the legislation as a whole must be kept in mind. . . .

The first step in interpreting the section in question is, therefore, to determine whether the language employed conveys a plain and unmistakable meaning, taking into consideration the context in which the words are used and the design and purpose of the legislation in its entirety. Before doing this, however, it will be well to indicate the authority which we have over the same subject matters under the Interstate Commerce Act.

That act does not authorize us to grant certificates of convenience and necessity to carriers by water, nor are such carriers prohibited from operating or abandoning operation until such a certificate has been obtained. The provisions of paragraphs (18) to (20) of Section 1 relate only to carriers by railroad. . . . [The Commission here refers to the provisions of Section 15 (3), Section 6 (13) (b), Section 15 (4), Section 15 (6), Section 3 (3), and Section 16a, of the Interstate Commerce Act.]

It thus appears that under the Interstate Commerce Act we have full authority to establish through routes and maximum joint rates over connecting rail and water lines and to prescribe the divisions of such joint rates; and that we may also, for good cause shown, at any time thereafter reconsider and reverse, change, or modify such requirements. But no such requirements may be made without prior full hearing, except that if we declare an emergency to exist we may establish temporarily through routes without notice or hearing.

This recital of existing powers under the Interstate Commerce Act is, we think, important, because it is a reasonable assumption that

Congress did not, in the legislation here in question, intend merely to duplicate authority already granted. Coming now to the question of whether the language employed in this legislation conveys a plain meaning, we shall undertake to analyze it part by part.

The part to which we shall first direct attention is this opening language:

Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of Section 1 of the Interstate Commerce Act, as amended.

There is here plainly no requirement that such an application be made, and the certificate referred to is not a prerequisite to continued operation or to the enjoyment of whatever benefits the water carrier may be able to derive from the provisions of the Interstate Commerce Act above recited. As will more clearly appear from the succeeding provisions of the section, quoted below, the certificate is a prerequisite only to the enjoyment of whatever benefits may be conferred by those succeeding provisions.

It is to be obtained "in accordance with the provisions of Section 1 of the Interstate Commerce Act." This clearly means, in our opinion, that it is to be obtained, subject to the exception noted below, in accordance with the procedure prescribed by those provisions.

This procedure is set forth in Section 1 (19) and provides, among other things, for notice to the governors of directly interested states, coupled with a right to be heard, and for "such rules and regulations as to hearings and other matters" as we may from time to time prescribe. It also clearly means that the certificates to be obtained shall be of a kind described in Section 1 of the Interstate Commerce Act.

Since the provisions in that section with respect to certificates of public convenience and necessity relate only to carriers by railroad, they cannot be given literal application but must plainly be translated into terms of transportation by water. So translated, the certificate to be obtained must be one that public convenience and necessity require or will require the operation of service by water between designated points located on designated waterways, whether entirely new service or an extension of existing service.

It is plain from the context that certificates permitting abandonment of operation are not here contemplated. It is also plain, in our

opinion, that the certificate to be obtained is not one merely that public convenience and necessity requires service by water between the designated points as a part of joint service with connecting rail carriers.

Such certificates would not be of a kind described in Section 1 of the Interstate Commerce Act. As in the case of a rail carrier the certificate is to be one that operation is required between certain points. The extent to which there shall be participation in through routes and joint rates with connecting carriers is elsewhere provided for, as it is also in the case of rail carriers which obtain certificates under Section 1.

The provision in question, however, must be read in connection with other provisions of the act of which it is a part, and if we find that giving the words their natural significance, to employ the language of the Supreme Court, "leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further." Section 3 (*a*) of the amended act provides as follows: . . . [The text here quoted will be found in IV, *Q*, *infra*.]

The corporation to which reference is made in this provision is the Inland Waterways Corporation. In so far as the present or future operation of that carrier is or may be thus carried on under mandate of Congress, the question of public convenience and necessity is plainly foreclosed by law. A hearing under such circumstances would be only an idle form, and the law should not be construed as requiring us to do a vain thing. Considering, therefore, the context and the policy of the legislation as a whole, we are of the opinion that a certificate may be issued under Section 3 (*e*) of the amended act to the Inland Waterways Corporation, in so far as present or future operation under positive mandate of Congress is concerned, without the notice or hearing provided for in Section 1 (19) of the Interstate Commerce Act.

The next portion of the section in question which we shall consider follows on immediately after that above quoted, and is as follows:

. . . and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carriers in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of Section 15 of the Interstate Commerce Act, as amended, and the Commission shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers.

There is here no provision for a hearing, unless it be contained in the words, "as provided in paragraph (3) of Section 15 of the Interstate Commerce Act, as amended." That paragraph makes no provision for a full hearing, but in our opinion the procedure so prescribed is not imported into this legislation by the reference to the paragraph. If it is so imported, nothing of substance is added to existing law, so far as the establishment of through routes and joint rates is concerned. The use of the words "as provided in" in place of the "in accordance with" employed in the prior reference to Section 1 of the Interstate Commerce Act also merits consideration.

We pass over these points, however, and direct attention to the word "thereupon," at the very beginning of this provision. Obviously the meaning is "forthwith" or "immediately following." The intention is clear that once the certificate of public convenience and necessity is granted, the order directing the establishment of through routes and joint rates shall issue either contemporaneously or immediately thereafter. This is inconsistent with a procedure that would require a full hearing prior to the issue of the order.

This inconsistency is confirmed, moreover, by the subsequent provision, quoted below, which authorizes us upon complaint and without the usual formalities to enter upon a hearing "covering (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission," and to give preference to the hearing and decision of such questions in order that they may be disposed of with the utmost expedition. Clearly, we think, it was the intent to substitute in this way subsequent hearings for prior hearings. This interpretation is further confirmed by the fact that the reference to paragraph (3) of Section 15 plainly does not apply to the fixing of "reasonable minimum differentials," and that there is in that connection no similar reference which can be made the basis for a claim that a hearing is required.

In our opinion the reference to paragraph (3) of Section 15 is for the purpose of describing and defining more definitely the through routes and joint rates which we are directed to require, and from the language of that paragraph we learn that they are to be such through routes and joint rates as we deem to be "necessary or desirable in the public interest." We further learn that they are to be through routes and joint rates with connecting carriers by railroad, for paragraph (3) has application to no other, and in this way any indefiniteness in the prior mention of "all connecting common carriers and their connections" is

overcome. But for the descriptive reference to paragraph (3), through routes and joint rates between connecting water carriers and between water carriers and connecting motor-truck lines might be contemplated. The immediately following direction that we shall fix "reasonable minimum differentials between all-rail rates and joint rates in connection with said water service" also makes it clear that the latter shall be fixed in terms of a relationship with the corresponding all-rail rates, i.e. that we shall fix a minimum spread which shall persist even if changes are made in the level of the rates. Provision for possible changes in level is made in the succeeding sentence.

The next portion of the legislation to which we shall refer follows immediately after that last quoted and is as follows :

The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within 30 days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within 120 days from date of publication the Commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates.

It will be noted that there is here no direct requirement of a hearing and no reference to a provision of the Interstate Commerce Act or any other law which could be claimed to import such a requirement into the legislation indirectly. The provision quoted is plain on its face and calls for no further discussion. Immediately following is this provision, of which mention has already been made. . . . [The Commission here quotes the rest of the paragraph as far as the proviso. For the text see IV, *Q*, *infra*.]

In our opinion the only rational interpretation of the above-quoted provision is that it is an attempt to substitute for hearings prior to our orders establishing through routes and joint rates, fixing minimum differentials, and prescribing equitable divisions, subsequent hearings upon complaint.

Otherwise the provision would in its entirety serve no substantial purpose, for, as we have already pointed out, Section 16a of the Interstate Commerce Act makes full and ample provision for the rehearing of decided cases and the modification or entire reversal of any orders which may have been entered therein. It is true that in the language above quoted provision is made for preference and expedition, but such a provision could as well have been directed to rehearings under Section 16a of the same classes of cases.

It is also provided that the burden of proof shall be upon the carrier or carriers making the complaint, but in the case of a rehearing under Section 16a the burden of proof would in any event be upon the party seeking to show that our decision was wrong or that our order should be changed. The interpretation which we have indicated is further confirmed by the provisions for preference and expedition in hearings and decisions and for dispensing with certain formalities prior to hearings. The need for such provisions, if the legislation requires full hearings prior to the entry of the original orders, is not apparent.

The provision quoted is plain on its face, with the possible exception of the authority given to the Commission to "make such order with reference to any such matters as it may find to be proper and in the public interest." This is unusual language and it is argued that it authorizes us, among other things, to make retroactive orders or provision for something akin to restitution or reparation for injury suffered. For present purposes we deem it unnecessary to express an opinion upon this point.

No other portion of Section 3 (e) of the amended act calls for consideration at this time, except the final sentence, reading as follows: "Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate."

This provision is descriptive, in our opinion, of the general class of joint rail and water rates which we are given authority to establish. They are to relate to the movement of traffic in which it is physically possible for the water line in question to participate, and do not embrace, for example, joint rates which could only be made effective by the establishment of switch connections or terminal facilities not yet in existence.

The sentence, when context and the legislation as a whole are considered, is plainly not to be construed as meaning that we must establish joint rail and water rates covering every movement of traffic in which it is physically possible for the water line to participate. Such a construction would be inconsistent with the reference to Section 15 (3) which we have already discussed.

It will thus be seen that we are of the opinion that the language of the section in question, so far at least as procedure is concerned — and that is all with which we are now concerned — conveys a plain meaning and that it is unnecessary to resort to extraneous sources of information in order to decide between conflicting possible interpretations.

If, however, it were thought that any such necessity exists, reference to the reports of the legislative committees would resolve any doubt in favor of the above interpretation. . . .

Having ascertained the plain meaning of the legislation in question from the language employed, and finding in addition that this meaning is clearly supported by the reports of the legislative committees, we have gone as far as we think we ought to go. The constitutionality of what has been done is for the courts to decide and upon that question we express no opinion. . . .

We shall proceed with the consideration of the application of the Inland Waterways Corporation which has already been filed under the statute in question, and of any other applications that may be filed thereunder, in the manner above indicated. To the extent that hearings are not held we shall endeavor to secure in other ways such information as we deem requisite in the determination of these applications. This proceeding is hereby discontinued. . . . [Commissioners WOODLOCK and BRAINERD wrote concurring opinions, and Commissioner FARRELL concurred with the latter.]

QUESTIONS

1. If the Commission has no discretion to refuse an order of public convenience and necessity applied for under paragraph 3, why insert the phrase "in accordance with the provisions of Section 1 of the Interstate Commerce Act"?
2. If that phrase means "in accordance with the procedure prescribed" by Section 1, why does the Commission not have power, under paragraph 19 of Section 1, to require full hearings before issuing an order?
3. What is the effect of the reference to Section 15, paragraph 3, of the Interstate Commerce Act? In particular, does it mean that in acting under paragraph (e) the Commission can fix only maximum rates, fares, or charges?
4. What objections do you see to the constitutionality of the act as construed by the Commission? Could the act reasonably be construed so as to avoid these objections?
5. What is the economic justification for requiring the Commission to take summary action in establishing through routes and joint rates in cases involving inland waterways?

(2) As to Rates imposed by State Authority

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 13, paragraphs 3 and 4 (I. C. Act, pp. 36-37). These paragraphs were introduced into the act by the Transportation Act of 1920.]

[B]

Railroad Commission v. Chicago, B. & Q. R. Co.

United States Supreme Court (1921), 257 U. S. 563

[In 1920 the Interstate Commerce Commission, acting under Section 15a of the Interstate Commerce Act, had ordered an increase of rates, in the group of which the Wisconsin common carriers were a part, amounting to 35 per cent in interstate freight rates, 20 per cent in interstate passenger fares, and 50 per cent in sleeping-car charges. The interstate carriers operating in Wisconsin then applied to the Wisconsin Railroad Commission for corresponding increases in intrastate rates. The Commission granted the freight-rate increase, but denied the rest on the sole ground that a state statute prescribed a maximum for passengers of two cents a mile. The Interstate Commerce Commission thereupon held a hearing under Section 13, paragraph 3, notifying the governor and railroad commission of Wisconsin, and reached the following conclusions as set forth in the preliminary statement of facts by TAFT, C. J.]

In the Wisconsin Passenger Fares, the Interstate Commerce Commission found that all of the respondent carriers of Wisconsin transported both intrastate and interstate passengers on the same train, with the same service and accommodations; that the state passenger, paying the lower rate, rode on the same train, in the same car, and perhaps in the same seat with the interstate passenger, who paid the higher rate; that the circumstances and conditions were substantially similar for interstate as for intrastate passenger service in Wisconsin; that travelers destined to, or coming from, points outside the state, found it cheaper to pay the intrastate fare within Wisconsin and the interstate fare beyond the border than to pay the through interstate fare; that undue preference and prejudice were shown by the falling

off of sales of tickets from border-line points in Minnesota and Michigan to stations in Wisconsin, and by a marked increase in sales of local tickets from corresponding border-line points in Wisconsin to stations in Wisconsin; that the evidence as to the practice with respect to passenger fares applied in like manner to the surcharge upon passengers in sleeping and parlor cars and to excess-baggage charges.

The Commission further found that the fare necessary to fulfill the requirement as to net income of this interstate railroad group under Section 15a was 3.6 cents per mile, and that this was reasonable, that the direct revenue loss to the Wisconsin carriers, due to their failure to secure the 20 per cent increase in intrastate fares, would approximate \$2,400,000 per year if the 3-cent fare fixed by the President under Federal war control were continued, and \$6,000,000 per year if the 2-cent fare named in the state statute should become effective.

The Commission found that there was undue, unreasonable, and unjust discrimination against persons traveling in interstate commerce, and against interstate commerce as a whole; and ordered that the undue discrimination should be removed by increases in all intrastate passenger fares and excess-baggage charges, and by surcharges corresponding with the increases and surcharges ordered in interstate business.

The order was made without prejudice to the right of the authorities of the state or of any other party in interest to apply in the proper manner for a modification of the order as to any specified intrastate fares or charges if the latter were not related to the interstate fares or charges in such a way as to contravene the provisions of the Interstate Commerce Act.

The carriers filed bills in equity, of which the present is one, in the district court, to enjoin the State Railroad Commission and other state officials from interfering with the maintenance of the fares thus ordered and published.

Application for interlocutory injunction was made to the district court under Section 266 of the Judicial Code. After a hearing before three judges, they granted an interlocutory injunction, from which this appeal was taken. . . .

MR. CHIEF JUSTICE TAFT, after stating the case, delivered the opinion of the court:

The Commission's order, interference with which was enjoined by the district court, effects the removal of the unjust discrimination found to exist against persons in interstate commerce, and against

interstate commerce, by fixing a minimum for intrastate passenger fares in Wisconsin at 3.6 cents per mile per passenger. This is done under paragraph 4 of Section 13 of the Interstate Commerce Act, as amended by the Transportation Act of 1920, which authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove "Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce."

We have two questions to decide.

First. Do the intrastate passenger fares work undue prejudice against persons in interstate commerce, such as to justify a horizontal increase of them all?

Second. Are these intrastate fares an undue discrimination against interstate commerce as a whole which it is the duty of the Commission to remove?

We shall consider these in their order.

First. The report and findings of the Commission undoubtedly show that the intrastate fares work an undue discrimination against travelers in interstate commerce and against localities (*Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342) in typical instances numerous enough to justify a general finding against a large class of fares. In a general order thus supported, possible injustice can be avoided by a saving clause allowing anyone to except himself from the order by proper showing. This practice is fully sustained by precedent in what was done as a sequence of the Shreveport Case (*Houston, E. & W. T. R. Co. v. United States*, *supra*). . . . In *Illinois C. R. Co. v. Public Utilities Commission*, 245 U.S. 439, this court indicated its approval of such practice, which was adopted by the Commission. . . .

The order in this case, however, is much wider than the orders made in the proceedings following the Shreveport and *Illinois C. R. Co.* cases. There, as here, the report of the Commission showed discrimination against persons and localities at border points, and the orders were extended to include all rates or fares from all points in the state to border points. But this order is not so restricted. It includes fares between all interior points, although neither may be near the border, and the fares between them may not work a discrimination against interstate travelers at all. Nothing in the precedents cited justifies an order affecting all rates of a general description when it is clear that

this would include many rates not within the proper class or the reason of the order. In such a case, the saving clause by which exceptions are permitted cannot give the order validity. . . .

If, in view of the changes, made by Federal authority, in a large class of discriminating state rates, it is necessary from a state point of view to change nondiscriminating state rates to harmonize with them, only the state authorities can produce such harmony. We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone.

Second. The report of the Commission shows that if the intrastate passenger fares in Wisconsin are to be limited by the statute of that state to 2 cents per mile, and charges for extra baggage and sleeping-car accommodations are to be reduced in a corresponding degree, the net income of the interstate carriers of the state will be cut six millions of dollars below what it would be under intrastate rates on the same level with interstate rates. Under paragraphs 3 and 4 of Section 13 and Section 15a, as enacted in Sections 416 and 422 respectively, of the Transportation Act of 1920, are such reduction and disparity and "undue, unreasonable, and unjust discrimination against interstate or foreign commerce" which the Interstate Commerce Commission may remove by raising the intrastate fares? A short reference to the circumstances inducing the legislation, and a summary of its relevant provisions, will aid the answer to this question.

The Interstate Commerce Act of February 4, 1887, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. The railroads availed themselves of the weakness and cumbrous machinery of the original law to defeat its purpose, and this led to various amendments, culminating in the amending act of June 18, 1910, in which the authority of the Commission in dealing with the carriers was made summary and effectively complete. Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal government, and by joint use of facilities, which the Anti-trust Law was thought to forbid under private management, and by use of government credit, to increase their effectiveness. This was done by appro-

priate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

Under title 2 it made provision for the termination of Federal control March 1, 1920, for the refunding of the carriers' indebtedness to the United States, and for a guaranty for six months to the carriers of an income equal to the war-time rental for their properties, and directed that for two years following the termination of Federal control, the Secretary of the Treasury, upon certificate of the Commission, might make loans to the carriers not exceeding the maximum amount recommended in the certificate, out of a revolving fund of \$300,000,000.

Under title 4, amendments were made to the Interstate Commerce Act which included Section 13, paragraphs 3 and 4, and Section 15a. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce,—a power already indirectly exercised as to persons and localities, with approval of this court, in the Shreveport and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years, the return is to be $5\frac{1}{2}$ per cent, with $\frac{1}{2}$ per cent for improvements, and thereafter is to be fixed by the Commission.

The act sought to avoid excessive incomes accruing, under the operation of Section 15a, to the carriers better circumstanced, by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission: (1) the issuing of future railroad securities by the interstate carriers; (2) the

regulation of their car supply and distribution and the joint use of terminals; and (3) their construction of new lines and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act.

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress, through the Interstate Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and 50 per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates"; i. e. powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to Section 13, paragraph 4, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is

impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, and unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words.

Counsel for appellants, not able to satisfy their meaning by the suggestion of any other discrimination to which they apply, are forced to the position that the words are tautological and a mere repetition of "any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If "undue, unreasonable and unjust discrimination against interstate or foreign commerce," are tautological why are they followed by the phrase "which is hereby prohibited and declared to be unlawful"? To accompany a meaningless phrase with words of such special emphasis would be unusual.

It is urged that in previous decisions, notably the Minnesota Rate Cases (*Simpson v. Shepard*), 230 U.S. 352, the Shreveport Case, 234 U.S. 342, and the Illinois C. R. Co. Case, 245 U.S. 493, the expression "unjust discrimination against interstate commerce" was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But, here, the general words are used after discrimination against persons and localities has been specifically mentioned. The natural inference is that, even if they include what has gone before, they mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important, and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect.

Counsel for appellants are driven by the logic of their position to maintain that the valuation required for the purposes of Section 15a to be ascertained pursuant to Section 19a of the Interstate Commerce Act is to be only of that part of the property and equipment of the interstate carriers which is used in commerce among the states, and must be segregated from that used in intrastate commerce. This is contrary to the construction which, since the enactment of Section 19a,

March 1, 1913, the Commission has put upon that section in carrying out its injunction. It is inadmissible. The language of Section 15a refutes such interpretation. The percentage is to be calculated on "the aggregate value of the railway property of such carriers held for and used in the service of transportation." To impose on the Commission the duty of separating property used in the two services when so much of it is used in both, and to do this in a reasonably short time for practical use, as contemplated by the statute, would be to assign it a well-nigh impossible task. This, of itself, prevents our giving the words such a construction unless they clearly require it. They certainly do not.

It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case (234 U.S. 342), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency. Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso. . . .

Counsel for the appellants have not contested the constitutional validity of the statute, construed as we have construed it, although the counsel for the state commissions, whom we permitted to file briefs as *amici curiæ*, have done so. The principles laid down by this court in the Minnesota Rate Cases, 230 U.S. 352, the Shreveport Case, 234 U.S. 342, and the Illinois C. R. Co. Case, 245 U.S. 493, which are rate cases, and in the analogous cases of *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 221 U.S. 612; *Southern R. Co. v. United States*, 222 U.S. 20; *Second Employers' Liability Cases*, 223 U.S. 1, we think, leave no room for discussion on this point. Congress, in its control of its interstate-commerce system, is seeking in the Transportation Act to make the system adequate to the needs of the country by

securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate-commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate-commerce system in doing state work. The affirmative power of Congress in developing interstate-commerce agencies is clear. *Wilson v. Shaw*, 204 U. S. 24; *Luxton v. North River Bridge Co.*, 153 U. S. 525; *California v. Central P. R. Co.*, 127 U. S. 1. In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it seems necessary or desirable. This is because of the supremacy of the national power in this field. . . .

It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.

It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion.

The order of the District Court, granting the interlocutory injunction, is affirmed.

QUESTIONS

1. Does the court convince you that a distinction was intended between "any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other," and "unjust discrimination against interstate commerce"? Exactly what is the distinction?

2. Since the court agreed with the Commission that there had been a discrimination against persons and localities, is not the construction of "discrimination against interstate commerce" *obiter dictum*?

3. Is the constitutionality of the provision, as construed by the court, clearly settled by the principles enunciated in the Minnesota Rate Cases?

4. Under this decision are there any limits to "incidental regulation of intrastate commerce" under the commerce clause?

5. A trunk line owns a short tap line that lies wholly within the state of Iowa and charges rates for traffic thereon as fixed by the Iowa Railway Commission. Has the Interstate Commerce Commission the power, under Section 13, paragraph 4, to increase these rates if it finds that they do not contribute a proper proportion to a fair return upon the aggregate value of the whole system, though it does not appear that there is any discrimination against persons or property in interstate commerce?

6. Is there any limit to the power of the Commission, under the clause as construed by the court, to fix intrastate rates?

7. Under the charter granted by New York to the New York Central Railroad, the railroad was bound not to charge more than two cents a mile for passengers traveling between Albany and Buffalo. Acting under Section 13, paragraph 4, the Interstate Commerce Commission ordered the railroad to increase the rate to $3\frac{1}{10}$ cents per mile. The state of New York sued to annul the order on the ground that it impaired the obligation of contract and deprived New York of property without due process. Decide.

8. What economic justification is there for permitting the Commission to exercise increased control over intrastate rates?

[C]

[After the decision in *Railroad Commission v. C., B. & Q. Railroad Co.*, 257 U.S. 563, a joint committee representing the Interstate Commerce Commission and the National Association of Railway and Utilities Commissioners discussed the problem of coöperation between national and state regulatory bodies and submitted a report setting forth the reasons and objects of coöperation and formulating a procedure to be followed in cases where coöperative action was feasible.

This report (see 36th Annual Report of the Interstate Commerce Commission (1922), pp. 233-234, for text) was adopted by the Commission on May 2, 1922, and later by a number of the state commissions. In 1925 a joint committee similarly constituted submitted a revision of the 1922 report, in which the rules of procedure are elaborated, rearranged, and enlarged. This "strengthened coöperative plan," which is given in this section, was adopted by the National Association of Railroad and Utilities Commissioners on October 14, 1925, and by the Interstate Commerce Commission on October 17, 1925.]

*Joint Committee Report of the Committee on Coöperation of the Interstate Commerce Commission and the Committee on Coöperation of the National Association of Railroad and Utilities Commissioners*¹

AGREED STATEMENT OF PRINCIPLES

... Coöperation is but the working together for a common object or to a common end or result, which end or result is the best possible regulation of the railroads and utilities mutually under the jurisdiction of the respective Federal and state commissions.

Public regulation of our railroads is performed in part by a commission representing the Federal government and in part by commissions representing the various states. Conflicts of jurisdiction between the two systems of public regulation have arisen from time to time, resulting in litigation and action by the courts; but the Federal and state commissions were alike created in the public interest and have a common purpose, namely, the maintenance of a transportation system which will in all respects best meet the public needs. In view of this common purpose they should, and we believe they can, work together for its attainment without conflict or resort to litigation. Such coöperation is contemplated by the Interstate Commerce Act as interpreted by the Supreme Court, and is highly desirable in the public interest.

The prime essential to such coöperation is realization of the nature and difficulties of the common problem. The state commissions realize that the railroads form a national transportation system and that the public interest demands a rate structure, state and interstate, as simple and harmonious as practicable. The Interstate Commerce Commission

¹ Thirty-ninth Annual Report of the Interstate Commerce Commission (1925), pp. 273-277.

realizes that there is danger in overcentralization of authority, that the field of regulation is vast, and that the state commissions are often better informed than itself in regard to local conditions and local needs.

In one of its most important aspects, coöperation must look forward to and have in view the avoidance, so far as the public interest will permit, of orders under Section 13 of the Interstate Commerce Act, affecting intrastate rates.

Paragraph (3) of Section 13 of the Interstate Commerce Act authorizes the Interstate Commerce Commission to avail itself of the coöperation, services, records, and facilities of state commissions, to confer with them with respect to the relationship between rate structures and practices of carriers, and to hold joint hearings with them "where the rate-making authority of a state is or may be affected by the action taken by the Commission." Our common purpose is to give the utmost force and effect to this provision of the law.

While coöperation between the Interstate Commerce Commission and the state commissions must in the nature of things be of the spirit and not a matter of rules and regulations, we are of the opinion that the following suggested procedure, with such modifications as time and experience shall prove advisable, and, except in special cases where it may be found necessary or desirable to deviate therefrom, should be followed :

PROCEDURE RECOMMENDED

1. Whenever a petition is filed with the Interstate Commerce Commission alleging that intrastate rates unjustly discriminate against interstate commerce, or persons or localities engaged therein, and asking the Federal commission to remove such discrimination, the state commission of the state or states affected thereby shall immediately be notified of such petition by the Federal commission. If either a state commission having jurisdiction over rates thus attacked, or the Federal commission desires a conference thereon, it should notify the other without delay, and thereupon such conference should be arranged, likewise without delay. If the case goes to trial, a joint hearing by the Interstate Commerce Commission and the commission of the state affected should be held, provided a proceeding or proceedings be pending before the state commission in which action can be taken upon the common record. Such joint hearing should be followed by conference to consider the facts developed of record so as to provide opportunity for the removal of the unlawful discrimination, if any, by agreement.

2. Joint conference should be held on complaints attacking interstate rates in those cases where the decision of the Interstate Commerce Commission appears likely to affect, in substantial and important respects, the relationship between state and interstate rate structures; likewise, conferences should be held in the case of complaints attacking interstate rates in those cases where the decision of the state commission appears likely to affect, in substantial and important respects, the relationship between state and interstate rate structures; and a joint hearing may be mutually agreed upon, with conferences on the record in either of such classes of cases.

Participation in such hearings or in conferences following submission will be upon invitation of the Interstate Commerce Commission, if the complaint is filed with it, or of the state commission, if the complaint is filed with it; but this shall not preclude either the Federal or a state commission from suggesting a conference in either a state or a Federal case where it shall appear to the one commission that the decision by the other commission may affect in substantial and important respects the rates primarily within the jurisdiction of the other commission.

Joint hearings will be appropriate where similar issues are pending before the Interstate Commerce Commission and a state commission, or informal conferences pending the decision of cases where there has been no participation in the prior hearings.

3. The provisions of the foregoing paragraph (2) include cases where it appears that the rate structures of two or more states, or in a group of states, may be affected by the proceedings pending. If by reason of the number of states affected, or otherwise, it shall be found impracticable or inconvenient for a member or employee of the commission of each such state to participate in the joint hearings or conferences, the commissions of the states affected should select a limited number of representatives to so participate on their behalf and to report back to the several state commissions for appropriate action by them: *Provided*, The commission of any state may appoint a representative or representatives to sit with the examiner or examiners of the Interstate Commerce Commission in joint hearings or conferences.

4. It shall be considered appropriate and desirable for either the Federal or state commission to suggest a conference to the other on any matter or proceeding where the one commission may be of the opinion that matters of mutual concern are involved and where coöperation may be had to advantage.

5. It is our judgment that state commissioners or their representatives would not expect or desire to sit with members of the Interstate Commerce Commission or its examiners in joint hearings in any case in which they appear as advocates. This is not to be understood as precluding a state commission from causing pertinent evidence to be presented in any such case with respect to the matters in issue.

6. The Federal and state commissions should feel free to suggest to each other, and the state commissions to hold among themselves, conferences on matters arising under their respective jurisdictions, with a view to harmonizing, in so far as practicable, rates and practices in neighboring states by appropriate action of the commissions of those states without proceedings before the Federal commission.

7. It is desirable that there be continued, in so far as practicable, the practice of the Interstate Commerce Commission of calling upon a state commission to hold hearings for it upon applications for certificates of public convenience and necessity, involving construction of new lines or abandonment of old lines. In such matters joint conferences between the Interstate Commerce Commission and a state commission may also be held upon the request of either commission.

8. In joint hearings involving interstate rates, the rules of practice prescribed by the Interstate Commerce Commission shall govern as far as applicable.

9. When a joint hearing is held under the coöperative plan and the case afterwards comes to argument before the Interstate Commerce Commission, it is to be understood that the coöperating state commissioners will be expected to sit with the Interstate Commerce Commission at the argument, if they so desire, and afterwards to take part in a joint conference to consider the disposition of the case. Notice of the assignment for oral argument will be sent to the interested state commission or commissions in each instance, and this notice will be understood to carry with it an invitation to the state commissioners to be present at the oral argument and sit with the Interstate Commerce Commission in conference when held. It is suggested, however, that in response to the notice the state commission or commissions should seasonably advise the secretary of the Interstate Commerce Commission of the number who will be present in order that seating arrangements may be made.

The aim is to establish the understanding that coöperative action involves always opportunity to sit at the argument and in subsequent conferences. However, special invitations will not be sent by the

Interstate Commerce Commission, and it will be understood that coöperating state commissioners will act upon information contained in the mimeographed notice from the section of dockets, if they desire to sit at the argument.

At the conclusion of a joint hearing the presiding Interstate Commerce Commission examiner and the participating state commissioners of [or] state commission representatives may, if practicable, hold an informal conference for an exchange of views in the case. It is obvious, of course, that in many cases the difficulties and complexities of the cases will make a satisfactory exchange of views impracticable at such times, in which event such state commissioners or state commission representatives may give the Interstate Commerce Commission examiner the benefit of their views in writing or otherwise, as may be convenient, before the proposed report of the Interstate Commerce Commission examiner is served. It will, of course, be understood that under the Interstate Commerce Commission practice the proposed report embodies the independent views of the examiner. At the same time, it is believed that an exchange of views with the state commissioners may aid the examiner in formulating his proposed report. A similar course is contemplated with respect to the forthcoming decisions of the state commissions based upon the record made in joint hearings: *Provided*, state commissioners or state commission representatives may indicate to the Interstate Commerce Commission their separate views, in writing.

Where there has been no oral argument, or the state commissioners have been unable to be present, an exchange of views, in writing or by joint conference, may be desirable.

10. The Interstate Commerce Act and the rules of the Interstate Commerce Commission provide for notice to the states in certain matters affecting them, and the Interstate Commerce Commission has been complying therewith. A state commission should advise the Interstate Commerce Commission of matters or proceedings before it in which it believes the Interstate Commerce Commission has an interest, as indicated in the foregoing text, by reason of the fact that interstate commerce may be affected by action of the state commission.

11. The utmost promptitude compatible with the circumstances is urged in order that coöperative action between the Federal and the state commissions may not be productive of delay in disposing of important matters and cases.

12. Applying the coöperative principle, conferences may be arranged for the development of car service, distribution, and administration, and in other matters which may occur to either the Federal or a state commission where it is the opinion that coöperation may be beneficial or advisable.

[D]

Coöperation of Federal and State Commissions¹

Since our last report state commissions have coöperated with us in twenty-eight proceedings in which interstate-intrastate rate relations were in some manner involved, consisting of complaints filed with us in respect of rates in effect, and investigation and suspension proceedings arising out of orders issued by us and state commissions suspending the effective dates of rates proposed by carriers, and, additionally, in the various inquiries conducted under No. 17000, "Rate Structure Investigation." They have also coöperated in eighteen construction and abandonment cases and six car-service cases. While the number of these proceedings is less than that reported in our last report, they have resulted in coöperative handling with most of the state commissions, all but nine of which have, at one time or another and as occasion arose, taken part in coöperative proceedings since statutory provision was made therefor in 1920.

b. BASIS UPON WHICH RATE FIXING IS TO REST

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15a, paragraphs 1-4 (I. C. Act, pp. 44-46). These paragraphs were introduced into the act by the Transportation Act of 1920.]

QUESTIONS

1. Do the provisions given above supersede the requirement that rates shall be just and reasonable?

2. Has not fair return upon the value of railroad property always been considered in determining the reasonableness of rates? If so, how do these provisions alter the present law?

¹Forty-first Annual Report of the Interstate Commerce Commission (1927), p. 65.

3. If, under paragraph 3, the Commission should determine that 3 per cent is a fair return, could the carriers appeal to the courts to review this rate?

4. Suppose paragraph 2 ordered the Commission to establish rates such that carriers as a whole would earn 1 per cent and no more on the aggregate value of their property. Would it be constitutional?

5. Why is the $5\frac{1}{2}$ per cent proviso limited to two years?

6. Does this basis of rate fixing favor any particular class of people?

7. Does the adoption of this principle make for higher or lower valuation of railroads?

8. Does it tend to strengthen or weaken the credit of the railroads?

9. Will it tend to promote the development of transportation facilities in the United States or to hinder it?

10. Is Section 15a a guaranty or not?

11. Do you see any objections to the government's guaranteeing to all interstate carriers returns amounting to a certain percentage of their valuation?

12. Would it be practicable to divide the railroads into groups, regional or systemic, and apply the plan of "straight guaranty," suggested in Question 11, to each group?

13. Why should the Commission be given the power granted in paragraph 2 to designate rate groups or territories?

14. Does this section apply to a corporation which owns railway cars and rents them to railway companies on a mileage basis?

[B]

Reduced Rates, 1922

Interstate Commerce Commission (1922), 68 I. C. C. 676

BY THE COMMISSION :

This proceeding was instituted upon our own motion for the purpose of determining whether, and to what extent, if any, further general reductions in rates, fares, and charges of carriers by railroad applicable in interstate or foreign commerce may lawfully be required under Section 1 or other provisions of the Interstate Commerce Act upon any commodities or descriptions of traffic ; and also to determine what will constitute a fair return on and after March 1, 1922, under Section 15a (3) of the Interstate Commerce Act.

The important questions for determination are whether present rates, fares, and charges, in the aggregate, as a whole, or in the several

rate groups defined in Increased Rates, 1920, 58 I. C. C. 220, 489, Authority to Increase Rates, *ibid.* 302, or upon specified commodities or descriptions of traffic, are or will be unreasonable under Section 1 or other provisions of the act; whether such rates, fares, and charges are those which will most nearly produce a fair return, as provided in Section 15a; and what the fair return shall be on and after March 1, 1922. . . .

In Increased Rates, 1920, *supra*, we exercised the discretion conferred upon us and to the $5\frac{1}{2}$ per cent return added the one half of 1 per cent during the two-year period to make provision for improvements, betterments, or equipment.

Since August, 1920, the carriers as a whole, or as a whole in their respective rate groups, have failed by a considerable margin to earn the authorized return. It is urged by some that under existing conditions the question of a fair return for the future is academic and that it is not necessary for us to determine a percentage of return at this time. We do not take this view. The operation of economic forces which have prevented, or which may hereafter prevent, carriers from earning a fair return under the adjustment of rates then prevailing does not constitute a bar to determination of what a fair return should be. By the qualifying words "as nearly as may be," Congress recognized that conditions during certain periods might prevent such realization under any adjustment of rates. . . .

The determination of what will constitute a fair return under paragraph (3) of Section 15a is, in our judgment, a function distinct from that of initiating and adjusting rates under paragraph (2) of that section. Section 15a, reasonably construed, contemplates the determination of a return which the carriers, collectively or in rate groups, may attain over a period of time under rates adjusted from time to time with that object in view. The phrase "from time to time" does not mean that we should adjust and readjust rates to meet business fluctuations. Whether carriers may be able to earn an aggregate net railway operating income equal to a fair return must depend to a large extent upon business conditions. . . .

We have before us a practical problem. The record emphasizes the need of a constant influx of capital to meet the country's growing transportation needs. . . . Some authorities on transportation and economic conditions . . . predict that, unless there is immediate resumption of new construction, a return of anything like normal business will result in "strangulation for lack of transportation." Others

are of opinion that the existing transportation machine, if properly maintained, with necessary additions in the way of terminals and trackage facilities, is adequate to handle the business which may reasonably be expected in the immediate future.

It is obvious that large additions to capital must continually be made. Most of the capital will have to be acquired through the issuance of securities which must be sold in the markets of the world in competition with other classes of securities. Within the next few years the government must provide for the refunding of some 6 billions of its indebtedness. The carriers must attract money by rates of return and stability of investment. While return must not exceed a reasonable charge against the public served, it must be such as to obtain the needed new capital. It is necessary to determine and make public, as required by Section 15a, a percentage of fair return. Determination of the percentage implies, or carries with it, no guaranty. Read in connection with the provision for recapture of one half of the excess above 6 per cent it is, instead, a limitation.

Because the yield on some railroad bonds has declined to something over 5 per cent it does not follow that a fair return should approximate that percentage. We do not deal alone with interest rates on mortgage obligations, or with the more favorably located and prosperous carriers whose credit conditions may enable them to obtain money at relatively advantageous rates. In the recapture provisions Congress recognized that uniform rates on competitive traffic which would adequately sustain all the carriers would produce substantially and unreasonably more than a fair return for some carriers. We should not take the few, and the highest type of their securities, as the basis for determining what shall be a fair return for all. It can hardly be disputed that the carriers of this country should not continue to provide for all needed capital by successive bond issues. Issuance of bonds in a disproportionate degree unduly increases fixed charges and tends to weaken the credit of the carriers. In such a process eventually a point must be reached where no new capital can be raised, except for short terms at high rates. No substantial proportion of the new capital has been raised by issuance of stock since 1907.

Notwithstanding the failure of the carriers to earn the 6 per cent allowed in the first two years of operation under Section 15a, there is an upward trend in railroad securities, which share in the improved conditions that have prevailed generally in the money market. This is urged upon us as an argument for reduction in the percentage to be

determined. Other elements, however, are to be considered. The intent of Congress was to create a steady and reliable flow of money "for enlarging such facilities in order to provide the people of the United States with adequate transportation." A substantial reduction in the percentage of return might be unsettling in its effect, particularly in the light of the fact that the return allowed in 1920 was not realized. The fact that a utility may reach financial success only in time or not at all is a reason for allowing a liberal return on the money invested in the enterprise. *Galveston Electric Co. v. City of Galveston*, 42 Sup. Ct. Rep. 351, decided April 10, 1922.

In numerous cases cited, courts and regulating authorities of states have recognized that public utilities and railroads may be permitted individually to earn under reasonable rates at least 6 per cent upon fair value. In some instances higher rates of return have been approved. But we are here considering return upon "the aggregate value of the railway property."

The Interstate Commerce Act in many provisions other than those quoted indicates that 6 per cent may be regarded as a fair return. Paragraph (6) of Section 15a provides for the disposition of net railway operating income in excess of 6 per cent of the value of the property held for and used in the service of transportation. One half of the excess goes into a reserve fund, which may be drawn upon for certain purposes, in accordance with paragraph (7), when net railway operating income for any year is less than a sum equal to 6 per cent upon the value. Under paragraph (12) we may make loans from the general railroad contingent fund, such loans to bear interest at the rate of 6 per cent per annum. Under paragraph (14) we may lease equipment or facilities purchased from the general railroad contingent fund, the rental charges to be at least sufficient to pay a return of 6 per cent per annum plus allowance for depreciation. That Congress by direct legislation fixed the fair return for the period of two years beginning March 1, 1920, at the rate of $5\frac{1}{2}$ per cent, to which, in our discretion, we might add not exceeding one half of 1 per cent, is a matter which may fairly be considered in the determination of the rate for the period immediately ensuing. But, taken in connection with the other provisions of Section 15a, it does not constrain us to consider $5\frac{1}{2}$ per cent as maximum in determining a fair return for the ensuing period.

Under our system of accounts all charges to the account "railway tax accruals" are deducted from railway operating revenues before arriving at railway operating income, and all state and Federal taxes,

income or other, relating to carriers' railway property, operations, and privileges are charged to that account. This method of accounting was recently sanctioned by the Supreme Court of the United States in *Galveston Electric Co. v. City of Galveston*, *supra*. As indicated by the court, the net income under this accounting procedure is to the stockholder a tax-exempt income, and this fact should be considered in determining what return shall be deemed fair.

The railway operating income, increased or diminished, as the case may be, by the credit or debit balances in the accounts known as equipment rents and joint-facility rents, becomes net railway operating income, the amount of which is less than it otherwise would be by the amount of income tax accrued or paid. The term "net railway operating income" is defined in paragraph (1) of Section 15a. Under paragraph (3), above quoted, rates are to be so adjusted that carriers as a whole or in designated rate groups will earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return. If this were realized in any instance the carrier would receive that return over and above all taxes, including the Federal tax on income, and if the fair return as determined and made public by us was 6 per cent the carrier would hold that return "tax free" in the sense that after payment of its income tax it would still have left the 6 per cent.

Railway corporations, like all others, are subject to income taxes which, since January 1, 1922, amount to 12.5 per cent on their net income less deductions computed as provided in the income tax law, 42 Stat. at L. 277. In our view railway corporations should, like other corporations, pay their Federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it to retain the designated fair return over and above the tax. We may observe that a fair return of 5.75 per cent, representing an aggregate annual net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent, out of which the Federal income tax was payable.

Railway Property Value

In *Increased Rates*, 1920, *supra*, one of the material facts to be determined was the aggregate value of the properties of the carriers held for and used in the service of transportation. . . .

Upon consideration of all the facts and matters then of record, and those which, under Section 15a, we were either required or authorized to consider, we found that the value of the steam-railway property of the carriers subject to the act held for and used in the service of transportation is, for the purposes of this particular case, to be taken as approximating the following:

Eastern group, as defined by the carriers	\$8,800,000,000
Southern group, as defined by the carriers	2,000,000,000
Western group, as defined by the carriers, including both the Western and Mountain-Pacific groups herein designated	<u>8,100,000,000</u>
Total	\$18,900,000,000

... In the instant proceeding there is little of record which goes directly to the subject of value. There has been a general acceptance by carriers and shippers of the value taken in our former determination as an appropriate basis for the purposes of the present proceeding. ...

Revenues and Expenses

... Federal control terminated with the month of February, 1920. In the succeeding six months a definite income was guaranteed to most rail carriers by the Transportation Act, 1920. The net railway operating income for 1921 of Class I carriers, including large switching and terminal companies, yielded returns of 3.30 per cent in the Eastern group, 2.60 per cent in the Southern group, 3.50 per cent in the Western and Mountain-Pacific groups, and 3.31 per cent for the United States as a whole, on the valuation for all roads taken by us in Increased Rates, 1920, *supra*, for the purposes of that proceeding, adjusted by the carriers to cover Class I roads only, together with additions and betterments on Class I roads aggregating \$605,000,000 for the year ended December 31, 1920. ...

The carriers state that they have applications pending before the Railroad Labor Board, seeking reductions in wages of their employees; and signify that if these applications are acted upon favorably corresponding reductions will be made in freight rates, taking credit for reductions previously made. They urge that if, in our judgment, the present high level of rates is made necessary by wage scales higher than those of comparable labor in other industries, we should make that fact known to the public. Railway labor organizations contend that there is no necessary relationship between transportation charges and wages of employees. They challenge the position taken by carriers

and some shippers that reductions in transportation charges cannot be made without contemporaneous wage reductions. . . .

It is not our function to deal with wage scales and we express no opinion as to what the rates of pay should be. But we must recognize the connection between necessary revenues and present relatively high operating expenses.

Efficiency and Economy in Operation

The statute provides that in exercise of our power to prescribe just and reasonable rates we shall establish rates such that carriers collectively shall earn a fair return under honest, efficient, and economical management. One of the matters for consideration in this proceeding is the extent to which net income can be increased by enhanced economy and efficiency in operation. The record indicates that the railroads individually, and collectively through their associations, have been and are devoting their attention to this matter. Substantial progress has been made in standardizing the various parts of equipment, thus increasing their interchangeability and promoting economy in equipment repairs. Committees of these associations are engaged upon plans to lower the unit cost of car repairs, fuel, and other items, and to reduce loss and damage. The evidence indicates realization of certain savings and improvements in operation. We are investigating methods of increasing economy and efficiency of operation. . . .

The record does not disclose any general lack of efficiency.

Maintenance

The significance of the return of 3.31 per cent given above for Class I railroads during 1921 depends to a considerable extent on whether the maintenance charges for that year represented adequate upkeep. Certain executives testified that the net railway operating income which resulted from the operations of 1921 was obtained only by forced economies which are neither in the public interest nor susceptible of indefinite continuance; that these economies took the form of inadequate maintenance; that the hours of labor consumed and the quantities of material applied in maintenance of way and structures on certain lines was less in 1921 than during the average of years in the test period; and that in general no more was done than was necessary to keep the lines in a condition safe for operation. . . .

When we consider the conditions which prevailed during 1921, the carriers' contention that current maintenance was deferred may have basis, but they have not supported their contention with such facts of record as would warrant us in making a definite finding of the extent to which it was deferred. . . .

We are of opinion that if the return of 3.31 per cent for Class I roads for the year 1921 were corrected, such corrected return would not vary so materially from 3.31 per cent as to make unsafe or unreliable the adoption of that figure as approximating the result of actual operation in 1921.

Constructive Year

Rapidly changing conditions since August, 1920, make the actual results of operation and the percentage earned of little value as a guide for the future, unless viewed in the light of present and prospective conditions. The carriers in response to our request introduced statements indicating what the results of the operations of Class I roads would be for a constructive year, based upon the traffic of 1921, under rates and costs prevailing in February, 1922. The statements reflect net railway operating income of \$443,609,800, or a yield of 5.06 per cent on a valuation of \$8,775,000,000 for the Eastern group; \$95,350,869, or a yield of 4.25 per cent on a valuation of \$2,243,499,045 for the Southern group; \$368,732,961, or a yield of 4.49 per cent on a valuation of \$8,206,000,000 for the Western district; and \$907,693,630, or a yield of 4.72 per cent upon a total of \$19,224,499,045 for Class I carriers in the United States as a whole. . . .

During 1915 and 1916 net railway operating income of Class I roads constituted the following percentage proportions of that for all "carriers," as defined in Section 15a (1), hereinafter referred to as all carriers: Eastern group, 98.39; Southern group, 97.68; Western district, 98.36. Upon the basis of these percentages for Class I carriers, the net railway operating income of all carriers for the constructive year, with certain guaranty period adjustments eliminated, would be \$448,776,952 for the Eastern group, \$92,328,072 for the Southern group, \$382,678,316 for the Western district, and \$923,783,340 for the United States. Predicated upon these figures, the percentage rates of return for the constructive year would be 5.23 in the Eastern group, 4.16 in the Southern group, 4.72 in the Western district, and 4.89 in the United States as a whole, on the valuation taken by us in Increased Rates, 1920, *supra*, modified by the transfer from the Eastern to the

Southern group of \$220,000,000 representing the Illinois Central north of Cairo. With due allowance made for the net changes in the carriers' properties in 1920, the rate of return for the carriers as a whole would approximate 4.7 per cent.

The results of the constructive year for Class I carriers as determined by them were obtained by adjusting the 1921 figures for freight revenue, operating expenses, and railway tax accruals in accordance with certain estimates determined separately for the Eastern group, the Southern group, and the Western district. . . .

[The estimates of the railroads for the various items under these three heads are examined in detail and criticized.]

Freight Rates and Charges

In Increased Rates, 1920, *supra*, we permitted percentage increases in the charges for freight service, including switching and special services, as follows: In the Eastern group, 40 per cent; in the Western group, 35 per cent; in the Southern and Mountain-Pacific groups, 25 per cent; and upon interterritorial traffic, $33\frac{1}{3}$ per cent. . . .

The positions of shippers and representatives of the public in this proceeding are diverse. Many urge immediate radical reductions, contending that rates in the aggregate or on particular commodities are unreasonable; that the increases of 1920 contributed to the depression which followed by a few months the date of their establishment; that notwithstanding some readjustments and reductions subsequently made, the existing rate level is preventing a revival of commerce, and, by diminishing the flow of traffic, defeats the desired end of producing adequate net return for the carriers. Others urge that rates be reduced as soon as possible, but express no opinion as to whether reductions should now be made. Most of the general commercial and shippers' organizations urge that reductions when made should apply generally to all rates, as did the increases of 1918 and 1920, but no shipper or shippers' organization urged reductions in fares as well as in rates. Numerous state commissions in the West and South contend that reductions should be made both in rates and in fares. The representatives of certain industries and of a few general organizations urge that reductions be applied only to basic commodities, the staples which are recognized as most important to the economic situation of the country, and which usually constitute low-grade freight.

The carriers are unanimous in the opinion that increased rates have not caused the business depression, which they attribute to generally recognized world-wide readjustments resulting in unfavorable trade and credit conditions, restricted purchasing power, contraction of consumption, and, in many instances, collapse of demand. The carriers contend that the increased rates were not even an important contributing factor in the lessening of traffic in 1921, and that reduction in rates will not restore normal traffic. They do not, however, advocate rate increases as a means to increase net revenue. They admit that rates are too high and must come down, but they insist that rates cannot be further reduced until the costs of transportation are further reduced.

Rates generally have been increased twice in the past four years, the increase of 1920 alone having been intended to produce more than one billion dollars additional revenue from the transportation of freight. As wages and cost of materials have been materially reduced since the increases of 1920, it is the position of shippers generally that the inability of the carriers to earn a fair return since these reductions were made is due largely to the failure of traffic to move in normal volume, and that the most important problem before us is to devise rates that will move more traffic and at the same time be compensatory to the carriers. It is generally recognized that existing high rates are a burden upon commerce, and many shippers insist that they are forcing movement to other forms of transportation, tend to restrict traffic, and in some instances to prevent particular movements. Many complaints are also made relative to the disturbance of relationships between producing or consuming districts due to the manner in which rates have been increased, and to partial readjustments which have subsequently taken place. The belief is general that traffic has been localized and the radius of distribution reduced. . . .

Some shippers contend that the psychological effect upon industry of existing high transportation charges is as important as the effect in dollars and cents. Agitation of the freight-rate question has been continuous, and the shipping public, aware that transportation charges are still on a high level, is discounting price deflation and withholding purchases in the expectation of lower delivered costs. This has a substantial effect upon the volume of traffic and revenues of carriers. Rate stability is one of the important needs of commerce. It is a fundamental law of business that the anticipation of a falling market tends

to restrict purchases. The public does not accept the present rate level as stable because of the belief that rates are too high, and must come down. . . .

Many shippers contend that such reductions as are made should apply upon traffic generally rather than upon specific commodities. . . . Shippers say that carriers' revenues have been depleted in the aggregate by piecemeal reductions, but that the public generally does not recognize such changes as a general lowering of the rate level; that the restoration of confidence and stabilization of business cannot be attained by such a process; and that any anticipation that reductions in freight rates will tend to increase confidence and a willingness to purchase can only be realized by reductions more general in extent than if limited to basic commodities. . . .

Shippers of basic commodities submitted the same general character of evidence relative to the necessity of rate reductions as other shippers, but advocated large reductions upon the basic commodities even though as a result no reductions may now be made upon other commodities. They urged that generally these commodities constitute low-grade freight which moves in any class of equipment, loads heavily, is subject to little loss or damage in transit, and consequently is desirable traffic for the carriers and entitled to the lowest rates. They also urged that, since the existing rates were authorized, price declines on basic commodities had been more severe than on higher-grade commodities; that their industries as a whole were in a depressed condition; that in some cases the commodities were being sold at a loss; that many basic commodities are important raw materials used in manufacture; that rate reductions thereon will do much to reduce cost of production and to stimulate business; and that generally transportation charges thereon were and are out of proportion to the value of the property transported, and restrict production and movement. . . .

[The Commission reviews at some length the facts relating to a number of basic commodities.]

Taken as a whole, the evidence relative to the miscellaneous commodities indicates that reductions confined to a few so-called basic materials would not satisfy many shippers and would bring about numerous complaints of discrimination between particular shippers or communities. . . .

Conclusions

The carriers take the position that we must be guided solely by those things which are definite and certain in the past. With this we cannot agree. Our function under the law is not that of mere computers and cannot thus be atrophied. The duty to prescribe rates for the future carries with it the obligation to exercise an informed judgment upon all pertinent facts, present and past, in order to forecast the future as best we may. . . .

When we decided Increased Rates, 1920, *supra*, the country was still in a period of steadily rising prices. We then resolved doubts as to future operating costs in favor of the carriers. In recent months costs have been declining and traffic increasing. Rates of pay for employees have been reduced to an extent which, based upon the light traffic of 1921, is estimated by carriers to aggregate more than \$350,000,000 per annum. The Railroad Labor Board has estimated that the reduction exceeds \$400,000,000 per annum, without taking into account changes in rules and working conditions. The tendency is toward increased revenues, lowered costs, and higher net income for the carriers.

Under the adverse conditions of 1921 the net railway operating income of Class I carriers of the United States totaled \$614,810,531. Based upon the subnormal traffic of that year, and the wage rates, and prices of materials and supplies, prevailing at the end of the year, the carriers in their constructive year estimated an aggregate net railway operating income of \$907,693,630, equal to 4.72 per cent upon the valuation used by us in Increased Rates, 1920, *supra*, as adjusted by carriers to cover Class I roads only, including additions and betterments since January 1, 1920, amounting to \$778,499,045. Adopting the ratio of net railway operating income of all carriers to that of Class I carriers in 1915 and 1916 as being approximately correct for 1921, the net railway operating income in the carriers' constructive year would be for all carriers \$923,783,340, or 4.89 per cent upon the valuation taken by us in Increased Rates, 1920, *supra*.

We do not accept the adjustments made by carriers in their constructive year as correct or complete. We have indicated that further adjustments are necessary in order better to reflect probable expenditures for Federal income tax, fuel, and materials and supplies. And in considering the estimates of that constructive year in their bearing upon what may be anticipated in the immediate future we must take into account other factors. Reductions in rates will carry with them

reductions in operating expenses of carriers through lessened transportation charges paid by them on their fuel and materials and supplies. Thus it is estimated that a reduction of 10 per cent in transportation charges on coal would effect a saving of over \$7,000,000 on the amount of coal consumed by Class I carriers in 1921. . . .

The figures heretofore given include no estimate for increased traffic over that of 1921, which clearly was subnormal. In that year the revenue ton-miles aggregated about 309.5 billions, or 25 per cent less than in 1920. We do not anticipate return to the tonnage of 1920 for some time to come, but there are many indications of greater tonnage than in 1921. . . .

Any additional tonnage realized should be handled under a favorable operating ratio. Shippers and carriers alike agree that if the freight traffic of 1921 is increased by a given percentage, the percentage of increase in operating expenses should be one half as great. It appears that under present rates, and with an increase of 10 per cent or more in traffic over that of 1921, not only would the net railway operating income of the carriers as a whole for the next twelve months be substantially in excess of the fair return herein determined, but it would greatly exceed the corresponding figure for any year in the history of railroad operation.

It is our duty to initiate such rates as will enable the carriers to earn as nearly as may be a fair return, qualified as provided in the act. . . . High rates do not necessarily mean high revenues, for, if the public cannot or will not ship in normal volume, less revenue may result than from lower rates.

Shippers almost unanimously contend, and many representatives of the carriers agree, that "freight rates are too high and must come down." This indicates that transportation charges have mounted to a point where they are impeding the free flow of commerce and thus tending to defeat the purpose for which they were established, that of producing revenues which would enable the carriers "to provide the people of the United States with adequate transportation." . . .

We are of opinion that general reduction in the rate level, as substantial as the condition of the carriers will permit, will tend not only to lessen the transportation burden but also to equalize and stabilize the conditions under which commerce and industry are carried on, with consequent fuller assurance to the carriers of realizing the fair return contemplated by the law. . . .

The justification for decrease is to be found in the rate structure as a

whole rather than in individual rates, or in rates on individual commodities. It is true that the prices of some commodities have receded more rapidly and to a greater extent than others, even as some went up more rapidly and to a greater extent than others. Readjustment, however, is not complete and the process of equalizing prices is still in progress, some coming up and others going down, which will probably result in a more equal price level in the near future. The needs of commerce cannot be met if rates are to fluctuate with market prices of commodities. In bringing down the rate level to meet lowered expenses a similar process should be followed and the reduction made generally upon all commodities in substantially equal ratio.

After considering all the facts of record, including the necessity of reasonable expenditures for additions and betterments, we find and determine:

1. That on and after March 1, 1922, a fair return upon the aggregate value of the railway property of the carriers defined in Section 15a of the Interstate Commerce Act, determined as therein provided, will be 5.75 per cent of such aggregate property value as a uniform percentage for all rate groups or territories designated by this commission.

2. That the existing freight rates and charges, including charges for switching and other accessorial services and all other charges applicable to freight service which were increased by authority of Increased Rates, 1920, *supra*, will be on and after July 1, 1922, unjust and unreasonable to the extent that they may respectively include more than the following percentages of increase over the rates in effect immediately prior to August 26, 1920, in and between the various rate groups as defined in Increased Rates, 1920, 58 I. C. C. 220, 489, and Authority to Increase Rates, *ibid.* 302:

In the Eastern group, also between points in Illinois territory and between Illinois territory and the Eastern group, 26 per cent instead of the 40 per cent authorized in the decisions last cited.

In the Western group, and between the Western group and Illinois territory, 21.5 per cent instead of the 35 per cent so authorized.

In the Southern and Mountain-Pacific groups, 12.5 per cent instead of the 25 per cent so authorized.

On interterritorial traffic, except as otherwise provided herein, 20 per cent instead of the $33\frac{1}{3}$ per cent so authorized.

3. That the freight rates and charges herein determined will enable the carriers in the respective rate groups, under honest, efficient, and economical management and reasonable expenditures for maintenance

of way, structures, and equipment, to earn an aggregate annual net railway operating income equal, as nearly as may be, to a return of 5.75 per cent upon the aggregate value, as taken for the purposes of this proceeding, of the railway property of such carriers held for and used in the service of transportation. . . .

[The remaining paragraphs deal with details relating to the application of the rate reductions.]

QUESTIONS

1. Is the Commission likely to act more often under paragraph 2 of Section 15a or under paragraph 3? Why?
2. In determining a fair return is the Commission justified in taking into account the need of new capital by the railroads?
3. Discuss the relation (1) between the percentage that constitutes a fair return and the average yield on railroad bonds; (2) between such a percentage and the price level of railroad stocks.
4. In naming a fair return why should the Commission be influenced by a consideration of how much the government may from time to time decide to take in taxes?
5. How does the Commission arrive at a return of 5.75 per cent?
6. Discuss the relevancy of public opinion "that rates are too high and must come down" to the question of the reasonableness of rates.
7. What criteria of reasonableness does the Commission use in this case?
8. In the face of the carriers' estimate of a net income of 4.89 per cent for the hypothetical "constructive year," based on the prevailing rates and prices, what reasonable expectation is there that with reduced rates the net income will approximate 5.75 per cent?
9. What percentage of decrease in rates is required by the opinion given above?

[C]

[The question of valuation for purposes of rate-making was considered in IV, *F*, 1, *b*, *supra*.]

c. DISPOSITION OF EXCESS RETURNS

(1) *The "Recapture" Clauses*

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15a, paragraphs 5, 6, 9, 17, and 18 (I. C. Act, pp. 46-47, 50). These paragraphs were introduced into the act by the Transportation Act of 1920.]

QUESTIONS

1. Does the recapture clause follow logically from the power to fix rates?
2. From the standpoint of community economics is there any justification for taking from a particular carrier part of its earnings?
3. Why would it not be better to authorize the Commission to fix the rates for each carrier so that each will receive a reasonable return on its value?
4. Under the operation of the recapture clause can a railroad ever pay more than a 6 per cent dividend on its stock?
5. Will this clause tend to destroy the initiative of the railroads or not?
6. "Why, if you can fix the maximum net profit upon a dollar invested in railways, can you not fix it on a dollar invested in the manufacture of engines or steel rails?" This question was asked in the debate on the bill. How would you answer it?
7. If the Interstate Commerce Commission should determine that 5 per cent was a fair return for a given year, and the X railroad earned 8 per cent, what would be done with the excess 3 per cent according to paragraphs 5 and 6?
8. If the Interstate Commerce Commission determined that 7 per cent was a fair return, and the X railroad earned 8 per cent, would 1 per cent go into the reserve fund and 1 per cent into the contingent fund?
9. If a railway makes a report showing excess income but refuses to pay the excess to the Commission, is it recoverable by proceedings in court? If so, is it recoverable by an action at law or by a suit in equity?

[B]

Dayton-Goose Creek Ry. Co. *v.* United States

United States Supreme Court (1924), 263 U. S. 456

MR. CHIEF JUSTICE TAFT delivered the opinion of the court:

The main question in this case is whether the so-called "recapture" paragraphs of the Transportation Act of February 28, 1920 (chap. 91, Section 422 [Section 15a], paragraphs 5-17) are constitutional.

The Dayton-Goose Creek Railway Company is a corporation of Texas, engaged in intrastate, interstate, and foreign commerce. Its volume of intrastate traffic exceeds that of its interstate and foreign traffic. In response to orders of the Interstate Commerce Commission, the carrier made returns for ten months of 1920, and for the full year of 1921, reporting the value of its railroad property employed in commerce and its net revenue therefrom. It earned \$21,666.24, more than 6 per cent on the value of its property in the ten months of 1920, and \$33,766.98 excess in the twelve months of 1921. The Commission requested it to report what provision it had made for setting up a fund to preserve one half of these excesses, and to remit the other half to the Commission.

The carrier then filed the present bill, setting forth the constitutional invalidity of the recapture provisions of the act, and the orders of the Commission based thereon, averring that it had no adequate remedy at law to save itself from the irreparable wrong about to be done to it by enforcement of the provisions, and praying that the defendants, the United States, the Interstate Commerce Commission, and the United States district attorney for the eastern district of Texas, be temporarily restrained from prosecuting any civil or criminal suit to enforce the Commission's orders, and that the court, on final hearing, make the injunction permanent. . . . The court dismissed the bill. . . .

While the Dayton-Goose Creek Railway Company was the sole complainant below and is the sole appellant here, nineteen other railway companies have, as *amici curiæ*, upon leave granted, filed briefs in support of its appeal. . . .

[The court here summarizes the provisions of Section 15a of the Interstate Commerce Act.]

This court has recently had occasion to construe the Transportation Act. . . . [Reference is made to *R. R. Commission v. C. B. & Q. Ry. Co.*, 257 U.S. 563, and *Akron, C. & Y. Ry. Co. v. U. S.*, 261 U.S. 184.]

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate-commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry

well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety. . . .

Title 4 of the Transportation Act, embracing Sections 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the stronger roads with the lower rates, and congestion would follow. The directions given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn more must hold the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of railways, whether strong or weak, to the varying percentages which are fair respectively for them. The recapture clauses are thus the key provision of the whole plan.

Having regard to the property rights of the carriers and the interest of the shipping public, the validity of the plan depends on two propositions.

First. Rates which, as a body, enable all the railroads necessary to do the business of a rate territory or section to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. He, with every other shipper similarly situated in the same section, is vitally interested in having a system which can do all the business offered. If there is congestion, he suffers with the rest. He may, therefore, properly be required, in the rates he pays, to share with all other shippers of the same section the burden of maintaining an adequate railway capacity to do their business. This conclusion makes it unnecessary to discuss the question mooted, whether shippers are deprived of constitutional rights when denied reasonable rates.

It should be noted that, in reaching a conclusion upon this first proposition, we are only considering the general level of rates and their direct bearing upon the net return of the entire group. The statute does not require that the net return from all the rates shall affect the reasonableness of a particular rate or a class of rates. In such an inquiry, the Commission may have regard to the service done, its intrinsic cost, or a comparison of it with other rates, and need not consider the total net return at all. Paragraph 17 of Section 15a makes this clear :

The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

This last clause only prevents the shipper from objecting to a particular rate otherwise reasonable, on the ground that the net return from the whole body of rates is in excess of a fair percentage of profit, — a circumstance that was never relevant in such an inquiry, as hereafter shown.

Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high

or speculative dividends, but that his obligation limits him to only fair or reasonable profit. If the company owned the only railroad engaged in transportation in a given section, and was doing all the business, this would be clear. If it receives a fair return on its property, why should it make any difference that other and competing railroads in the same section are permitted to receive higher rates for a service which it costs them more to render and from which they receive no better net return? Classification of railways in the matter of adjustment of rates has been sustained in numerous cases. In the *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U.S. 352, it was held that the rates imposed by the state upon two railways were not confiscatory, but that they were so in the case of a third railway performing service in the same territory, because the latter was put to greater expense in rendering the service. An injunction was refused to the first two railways and was granted to the third. The same principle has been upheld in analogous cases. . . .

It is argued that to cut down the operating profit of the stronger roads to a certain per cent is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates, and cannot be used as evidence of their reasonableness. *Northern P. R. v. North Dakota*, 236 U.S. 585, and *Interstate Commerce Commission v. Union P. R. Co.*, 222 U.S. 541, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice Lamar, speaking for the court, in *Interstate Commerce Commission v. Union P. R. Co.* (p. 549):

Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds but little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article.

There is nothing in the act requiring the use of the net return as evidence to fix a particular rate. As we have already pointed out, paragraph 17, Section 15a, gives fullest latitude for evidence on such an issue.

Reliance is also had on decisions of this court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit was not relevant. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352; *Smyth v. Ames*, 169 U. S. 466. But this conclusion does not make against the use of a fair return of operating profit as a standard of reasonableness of rates when the issue is as to the general level of all the rates received by the carrier.

The reduction of the net operating return provided by the recapture clause is, as near as may be, the same thing as if rates had all been reduced proportionately before collection. It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in determining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable, so far as the carrier is concerned, is to reduce its profit to what is fair.

We have been greatly pressed with the argument that the cutting down of income actually received by the carrier for its service to a so-called fair return is a plain appropriation of its property without any compensation; that the income it receives for the use of its property is as much protected by the Fifth Amendment as the property itself. The statute declares the carrier to be only a trustee for the excess over a fair return received by it. Though in its possession, the excess never becomes its property, and it accepts custody of the product of all the rates with this understanding. It is clear, therefore, that the carrier never has such a title to the excess as to render the recapture of it by the government a taking without due process.

It is then objected that the government has no right to retain one half of the excess, since, if it does not belong to the carrier, it belongs to the shippers, and should be returned to them. If it were valid, it

is an objection which the carrier cannot be heard to make. It would be soon enough to consider such a claim when made by the shipper. But it is not valid. The rates are reasonable from the standpoint of the shipper, as we have shown, though their net product furnishes more than a fair return for the carrier. The excess caused by the discrepancy between the standard of reasonableness for the shipper and that for the carrier, due to the necessity of maintaining uniform rates to be charged the shippers, may properly be appropriated by the government for public uses because the appropriation takes away nothing which equitably belongs either to the shipper or to the carrier. Yet it is made up of payments for service to the public in transportation, and so it is properly to be devoted to creating a fund for helping the weaker roads more effectively to discharge their public duties. Indirectly and ultimately this should benefit the shippers by bringing the weaker roads nearer in point of economy and efficiency to the stronger roads, and thus making it just and possible to reduce the uniform rates.

The third question for our consideration is whether the recapture clause, by reducing the net income from intrastate rates, invades the reserved power of the states and is in conflict with the Tenth Amendment. In solving the problem of maintaining the efficiency of an interstate-commerce railway system which serves both the states and the nation, Congress is dealing with a unit in which state and interstate operations are often inextricably commingled. When the adequate maintenance of interstate commerce involves and makes necessary on this account the incidental and partial control of intrastate commerce, the power of Congress to exercise such control has been clearly established. *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U.S. 352; *Illinois C. R. Co. v. Behrens*, 233 U.S. 473; *Shreveport Case* (*Houston E. & W. T. R. Co. v. United States*), 234 U.S. 342; *Illinois C. R. Co. Case*, 245 U.S. 493; *Railroad Commission v. Chicago, B. & Q. R. Co.*, 257 U.S. 563. The combination of uniform rates with the recapture clauses is necessary to the better development of the country's interstate-transportation system as Congress has planned it. The control of the excess profit due to the level of the whole body of rates is the heart of the plan. To divide that excess and attempt to distribute one part to interstate traffic and the other to intrastate traffic would be impracticable and defeat the plan. This renders indispensable the incidental control by Congress of that part of the excess possibly due to intrastate rates, which, if present, is indistinguishable.

It is further objected that no opportunity is given under Section 15a for a judicial hearing as to whether the return fixed is a fair return. The steps prescribed in the act constitute a direct and indirect legislative fixing of rates. No special provision need be made in the act for the judicial consideration of its reasonableness on the issue of confiscation. Resort to the courts for such an inquiry exists under Sections 208 and 211 of the Judicial Code. It is only where such opportunity is withheld that a provision for legislative fixing of rates violates the Federal Constitution. *Ohio Valley Water Co. v. Ben Avon*, 253 U.S. 287. . . .

The decree of the district court is affirmed.

QUESTIONS

1. How does it follow from the principle of the *Minnesota Rate Cases* that railroads may be classified in adjusting rate schedules, that the net returns of all railroads may be limited?

2. Does the court admit that net income is a test of the reasonableness of rates as a whole? Is it not possible that inefficiency of operation might result in a deficit, though rates were reasonable?

3. If profitable railroads are compelled to contribute to the support of unprofitable ones, why is there not a denial of the equal protection of the laws?

4. Would an act of Congress declaring that railroads engaged in interstate commerce should hold all net railroad operating income as trustees for the United States be constitutional? Give reasons.

5. It is argued that, inasmuch as under paragraph 5 of Section 1 of the act the rates must always be just and reasonable, the carriers are entitled to receipts therefrom as their property, and that to deprive them of part of such receipts is in effect to say that the rates which *ex hypothesi* are reasonable are in fact unreasonable. Is this argument sound?

6. How can there be a "discrepancy between the standard of reasonableness for the shipper and that for the carrier"?

7. "If the state of Pennsylvania declares anthracite coal a public utility, and its legislature fixes 8 per cent as a fair return upon the value of the property in anthracite mines, it would seem clear that under this decision the companies would never receive title to the excess earnings over 8 per cent." Do you agree with this?

8. "The true value of a railroad is obtained by capitalizing the net income at the rate determined by the Commission to be a fair return upon railroad investments, and if this is done there will be no excess income." Criticize this statement.

9. What is the economic basis of the provision of the Transportation Act discussed in this case?

370 GOVERNMENT AND RAILROAD TRANSPORTATION

[C]

*Recovery of Excess Net Railway Operating Income, 1920-1928*¹

To date we have issued eight general orders upon all carriers subject to Section 15a of the act. Our last order was dated January 4, 1928, and covered the calendar year 1927. In response to these orders carriers have filed reports showing the following results with respect to excess net railway operating income subject to the recapture clause of the section :

PERIOD	NUMBER OF REPORTS	NUMBER OF REPORTS IN WHICH EXCESS INCOME IS REPORTED	TOTAL AMOUNT OF EXCESS IN- COME REPORTED
Applicable period, 1920 . . .	991	34	\$2,505,006.17
Calendar year :			
1921	973	27	458,535.72
1922	929	50	1,865,153.46
1923	897	52	6,878,593.92
1924	894	23	1,191,603.75
1925	886	24	2,275,050.68
1926	874	15	1,033,497.02
1927	821	8	170,807.25
Total excess			\$16,378,247.97

Many of the reports filed include groups of carriers claimed by respondents to have been under common control and management and operated as single systems within the provisions of paragraph (6) of Section 15a. The question of grouping into systems is under consideration and it is anticipated that definite principles will be established when a decision has been reached in cases now submitted on the formal docket.

We again call attention to the fact that the excess income reported has not been computed upon values fixed by us. Under our orders carriers have been permitted to compute their claimed values upon such basis as they deem proper. Under this procedure many different bases have been used. When values shall have been fixed by us the number of carriers found to have earned excess income and the amount thereof may differ from the results shown in carriers' reports.

In our last report we stated that one hundred and ninety-eight electric railways claimed exemption from the provisions of Section 15a.

¹ Forty-second Annual Report of the Interstate Commerce Commission (1928), p. 5.

There has been no material change in this status, and further proceedings will be instituted as may be necessary in individual cases supplementing or applying the principles announced in Application of Section 15a to Electric Rys., 86 I. C. C. 751.

QUESTIONS

1. Until the Interstate Commerce Commission has completed the valuation of the railways would it not simplify the operation of Section 15a for Congress to provide that all railways shall use the same base for the computation of excess income, such as outstanding capitalizations? If so, what practicable bases can you suggest?

2. Why should interstate electric railways be exempted from the operation of the recapture clause (see Section 15a, paragraph 1)?

(2) *The Reserve Fund*

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15a, paragraphs 7 and 8 (I. C. Act, p. 47). These paragraphs were introduced into the act by the Transportation Act of 1920.]

(3) *The General Railroad Contingent Fund*

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15a, paragraphs 10-16 (I. C. Act, pp. 47-50). These paragraphs were introduced into the act by the Transportation Act of 1920.]

[B]

*The General Railroad Contingent Fund*¹

During the year nine carriers paid to us the total sum of \$866,277.44 as one half of their excess income preliminarily computed by them for the several recapture periods. Added to the \$7,140,930.95 paid prior to November 1, 1927, this sum makes the total of such payments \$8,007,208.39. As stated in our previous reports, the bulk of these payments has been made under formal protests and reservations.

¹ Ibid. pp. 5-6.

372 GOVERNMENT AND RAILROAD TRANSPORTATION

Consequently the general railroad contingent fund, created by paragraphs (6) and (10) of the section, which is composed in part of such payments, has not been available for the purposes contemplated by the statute.

Contingent fund moneys continue to be held in the Treasury of the United States as a trust fund for investment in obligations of the United States. The present status of the fund is as follows :

Payments by carriers of excess income	\$8,007,208.39
Payments by carriers of interest on overdue payments	20,559.09
Interest from investments in obligations of the United States . . .	<u>1,157,210.62</u>
Total credits to the general railroad contingent fund	\$9,184,978.10

In addition to the foregoing payments, there have been pledged under funding agreements, \$1,200,000 of railroad securities, and \$29,300 in cash, held by the Treasurer of the United States and other authorized depositories for safekeeping subject to our order, as part security for estimated excess earnings.

The following obligations of the United States are held for account of the fund :

United States Treasury 4 per cent bonds of 1944-1954	\$3,630,000
United States $4\frac{1}{2}$ per cent fourth Liberty loan bonds of 1933-1938 . .	<u>5,350,800</u>
Total face amount	\$8,980,800

QUESTIONS

1. Explain clearly just how this contingent fund can be of any assistance to the weaker roads.
2. Why should the surplus earnings of the strong roads not be distributed among the roads suffering a deficit?
3. If a railroad's credit is so poor that it has to pay 6 per cent for borrowed money, how can it be improved by going deeper into debt at a high rate of interest?
4. Will this scheme not tend to bring about government ownership of the weaker roads?
5. Which do you think the more valuable: the provisions for loans or the provisions for the leasing of equipment and facilities?

10. TRANSPORTATION FREE OR AT REDUCED RATES

a. GENERAL PROVISIONS

[A]

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 1, paragraph 7, and Section 22, paragraph 1 (to the clause preceding the proviso), in the Sundry Civil Appropriations Act of August 1, 1914, in the Post Office Department Appropriation Act of July 28, 1916, in the Army Appropriation Act of August 29, 1916, and in an act of February 17, 1917, relating to the Cincinnati Southern Railway (I. C. Act, pp. 4-6, 74, 81-82). Paragraph 7 of Section 1 was added to the Interstate Commerce Act by the Hepburn Act of 1906, but the third proviso was introduced by an amendment of 1908, and the second by the act of June 18, 1910. After the amendment of 1889 the portion of Section 22 here referred to was not changed until 1927, when the two provisions printed below were added.]

Act of February 26, 1927: Nothing in this act shall be construed to prohibit any common carrier from carrying any totally blind person accompanied by a guide at the usual and ordinary fare charged to one person, under such reasonable regulations as may have been established by the carrier.

Act of March 4, 1927: Nothing in this act shall prevent any carrier or carriers subject to this act from giving reduced rates for the transportation of property to or from any section of the country with the object of providing relief in case of earthquake, flood, fire, famine, drought, epidemic, pestilence, or other calamitous visitation or disaster, if such reduced rates have first been authorized by order of the Commission (with or without a hearing); but in any such order the Commission shall define such section and shall specify the period during which such reduced rates are to remain in effect.

QUESTIONS

1. Is a person who is riding upon an engine without paying fare, but with the permission of the engineer, committing a violation of the act?
2. Is the father of an employee, even though he does not live with the employee, a member of his family within the meaning of this section?
3. Under this provision may a carrier subject to the act interchange passes with one not subject to the act?

4. May express companies exchange franks giving free transportation of personal property to officers and employees of the companies and their families?

5. Can the Interstate Commerce Commission compel common carriers to give free transportation to any of the classes mentioned in the statutes referred to above?

6. What is the economic justification for giving free transportation to any of these classes?

7. From the standpoint of economic policy are the provisions of this section unduly liberal? Why should the paying patrons of the railways bear the burden imposed by the free carriage of the classes enumerated therein?

[B]

Nashville, Chattanooga, & St. Louis Railway et al. *v.* State of Tennessee et al.

United States Supreme Court (1923), 262 U.S. 318

MR. JUSTICE BRANDEIS delivered the opinion of the court :

[The opinion quotes the first part of Section 22 of the Interstate Commerce Act.]

... Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce, is the main question for decision.

On July 29, 1920, the Interstate Commerce Commission authorized a general increase, throughout southern territory, of 25 per cent in interstate freight rates. *Ex parte* 74, Increased Rates, 1920, 58 Inters. Com. Rep. 220. Thereafter, the Railroad and Public Utilities Commission of Tennessee authorized, for that state, a like increase of intrastate rates. But the following articles (among others) were excluded from this increase: Carload shipments of stone and gravel, when for use in building public highways, and consigned to Federal, state, county, and municipal authorities, or their bona fide agents. To remove the exception, carriers applied to the Interstate Commerce Commission, claiming that the exception produced illegal discrimination against interstate commerce and an undue prejudice to persons and localities engaged in such commerce. The Commission found such discrimination, and ordered that the intrastate rates on these commodities, also, be increased to the level of the interstate rates. Re

Tennessee Rates & Charges, 63 Inters. Com. Rep. 160, 172. On October 21, 1921, the state of Tennessee and its commission brought, in the Federal court for the middle district of Tennessee, this suit against the United States, to have the order set aside. The Interstate Commerce Commission, the Nashville, Chattanooga, & St. Louis Railway, and two other interstate carriers, intervened as defendants. The case was heard by three judges under the act of October 22, 1913, chap. 32, 38 Stat. at L. 208, 219. A final decree was entered, declaring the order void, and enjoining its enforcement. 284 Fed. 371. The case is here on two appeals. No. 396 is that of the carriers; No. 429, that of the United States and the Interstate Commerce Commission.

Railroad Commission v. Chicago, B. & Q. R. Co., 257 U.S. 563, had been decided by this court before entry of the judgment appealed from. But the district court considered that case inapplicable; and held that, by reason of Section 22, the Interstate Commerce Commission is "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight"; that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom of discrimination."

The argument is, in substance, this: An order of the Interstate Commerce Commission, increasing intrastate rates to the level of interstate rates, must rest upon a finding of illegal preference resulting from the relation of intrastate to interstate rates. Preference to governmental shippers is expressly permitted by Section 22 of the act. Hence, a grant of such preference cannot be held to be unjust or unreasonable under Sections 2 and 3. There was no finding that these lower intrastate rates resulted in failure of the intrastate traffic to yield its proper share of the earnings of the carriers. Consequently, the order of the Commission is void. . . . The argument is, in our opinion, unsound.

Every rate which gives preference or advantage to certain persons, commodities, localities, or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by Sections 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 219, 220; *Manufacturers R. Co. v. United States*, 246 U.S. 457, 481. Whether

a preference or discrimination is undue, unreasonable, or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland R. Co.*, 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue, or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity, or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice or disadvantage to some other person, commodity, or locality, or to interstate commerce.

Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson v. Baltimore & O. R. Co.*, 222 U.S. 506, 511. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited, is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier, theretofore enjoyed, of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

The grant of a lower rate on road material to a government engaged in highway construction may benefit the government without subjecting to prejudice any person, locality, or class of traffic. But a lower rate may result in giving to a single quarry within the state all of the governmental business, so that competing quarries and localities within or without the state, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission, was expressly found by the Interstate Commerce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & P. B. R. Co. v. United States*, 257 U.S. 114.

There is nothing in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U.S. 263, 278; *Lake Shore & M. S. R. Co. v. Smith*, 173 U.S. 684, or *Pennsylvania R. Co. v. Towers*, 245 U.S. 6, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them. . . .

Reversed.

MR. JUSTICE SANFORD took no part in the consideration or decision of these cases.

QUESTIONS

1. Does the opinion of the court give full effect to the provision of Section 22 that "*nothing* in this act shall prevent the carriage at reduced rates for the governments"?

2. "The provisions [of the section] are illustrative, not exclusive." Explain.

3. If the section "confers no right on any shipper or traveler" and does not "confer any new right upon the carrier," then, under the construction given by the court in the principal case, what does it do?

4. Show by a concrete illustration how a carrier could give reduced rates to government freight without laying itself open to attack on the ground of unjust discrimination.

5. What economic justification is there for reduced rates to government traffic?

6. Can the Interstate Commerce Commission require interstate carriers to give reduced rates for government traffic?

7. The P railway grants free return movement of property exhibited at expositions and state fairs when freight charges have been paid to the fair from the point of shipment. The S dairy company ships exhibits from its factory to the National Dairy Show Association in Chicago at the regular rates; but the railway refuses free return transportation, pointing out that their rule does not apply to "industrial or trade expositions." The dairy company complains to the Interstate Commerce Commission. Decide.

b. MILEAGE, EXCURSION, AND COMMUTATION TICKETS

[A]

[The pertinent statutory provisions are found in Section 22 of the Interstate Commerce Act, lines 8 and 9, and all the second proviso of paragraph 1 and all of paragraphs 2 and 3 (I. C. Act, pp. 74-76). The proviso of paragraph 1 was added to the act in 1895 and paragraphs 2 and 3 on August 18, 1922.]

QUESTIONS

1. What economic justification is there for issuing mileage, excursion, or commutation passenger tickets at special rates?
2. What provisions should be made as to the amount of free baggage permitted to be carried under such tickets?
3. What principles should determine the relation between the rates for summer excursion tickets and the normal rates?
4. Has the Commission power to examine the reasonableness of rates charged for commutation tickets issued by the railroad under paragraph 1?

[B]

United States *v.* New York Central Railroad Company

United States Supreme Court (1924), 263 U.S. 603

MR. JUSTICE HOLMES delivered the opinion of the court :

This is a bill in equity, brought by railroad companies to prevent the enforcement of an order of the Interstate Commerce Commission dated March 6, 1923, following reports of January 26 and March 6, 1923. 77 Inters. Com. Rep. 200, 647. The order purports to be made in pursuance of the act of August 18, 1922, chap. 280, 42 Stat. at L. 827. This act amended Section 22 of the Interstate Commerce Act by adding to what became (1) two paragraphs, viz. : (2) directing the Commission to require the railroads subject to the act, with such exemptions as the Commission holds justified, to issue interchangeable mileage scrip coupon tickets at just and reasonable rates, in such denominations as the Commission may prescribe, with regulations as to use, and prescribing whether the tickets are transferable or not transferable, and, if the latter, what identification may be required, and what baggage privileges go with such tickets ; (3) making it a misdemeanor for any carrier to refuse to issue or accept such tickets as required, or to conform to the Commission's rules, or for any person willfully to offer for sale or carriage any such tickets contrary to such rules. After a hearing the Commission ordered the railroads specified, being all the railroads having annual operating revenues in excess of \$1,000,000, and known as Class 1, to issue, at designated offices, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket.

The bill alleges that the amendment of 1922, as construed by the Commission, is contrary to the Fifth Amendment and to the commerce clause, Art. 1, Section 8, of the Constitution, but that, properly construed, it does not authorize the order made. The order is alleged to apply to intrastate carriage, and also to be inconsistent with Section 2 of the Interstate Commerce Act, which requires like charges for like service in similar circumstances; with Section 3, forbidding unreasonable preferences; with Section 15a, providing for the establishing of rates for rate groups that will earn a fair return upon the aggregate value of the property used in transportation (see *Re Increased Rates*, 1920, cited as *Ex parte* 74, 58 Inters. Com. Rep. 250; *Re Reduced Rates*, 1922, 68 Inters. Com. Rep. 676), and with Sections 1 and 22, requiring the Commission to establish just and reasonable fares. These averments are developed in detail, but we do not dwell upon them because the decision below and our own turn upon a different point. It is further alleged in the bill that the conclusion stated by the Commission that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the district court. They held that the Commission considered that the amendment of 1922 either required it to make a reduction, or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that therefore the order could not stand, considering that the amendment of 1922, like the rest of the Interstate Commerce Act, called for an unbiased opinion upon the merits of the case. They issued a perpetual injunction and the defendants appealed. 288 Fed. 951.

We are of opinion that the interpretation of the statute in the court below was right. There is no doubt that the bill owed its origin to a movement on the part of traveling salesmen and others to obtain interchangeable mileage or scrip coupon books at reduced rates. The bill that was passed originally fixed reduced rates, but it was amended to its present form undoubtedly because the prevailing opinion was that the rates should be determined in the usual way, by the usual body. The object of the traveling salesmen was defeated in so far as Congress declined to take any step beyond authorizing the issue of

scrip tickets. Coming, as it did, from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise; but in fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act. The original purpose of the amendment as introduced retained headway enough to require the issue of scrip, but there the purpose was stopped; and, as not infrequently happens in legislation, the matter was left otherwise where it was before. Apart from constitutional difficulties (*Lake Shore & M. S. R. Co. v. Smith*, 173 U.S. 684), the whole tendency of the law has been adverse to the enactment as proposed; at least, unless a clear case should be made out.

The Commission, in its report, pointed out that the net railway operating income for the seven months ending July 31, 1922, was below the return fixed as reasonable, discarded the supposed analogy between the carload rate and the interchangeable scrip or mileage ticket, intimated that the supposed benefit that the carrier might get from the advance use of the money would be more than offset by the increased expenses, and said that the question whether the scrip ticket would stimulate travel sufficiently to meet any loss that might result must remain a matter of speculation until an experiment was made. After thus excluding the grounds upon which the order could be justified, the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent would be "just and reasonable for this class of travel." It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand.

Decree affirmed.

QUESTIONS

1. What is the importance of the change made in Section 22 in 1922?
2. Should mileage or scrip coupon tickets be transferable or not?
3. Was the order issued by the Commission inconsistent with Section 2 of the Interstate Commerce Act, which requires like charges for like services under similar circumstances?

4. Did it give an undue or unreasonable preference or advantage to particular persons, contrary to Section 3 of the act?

5. If Congress passed a law requiring all interstate railways to issue joint interchangeable five-thousand-mile scrip coupon tickets to be sold at a reduction of 20 per cent from the face value of the ticket, would the law be constitutional?

6. What is the "supposed analogy between the carload rate and the interchangeable mileage ticket"?

7. Could the Commission, under paragraph 2, order the issue of mileage books at regular rates and require railroads to accept the coupons for passage between two towns in the same state?

[C]

Interchangeable Mileage Ticket Investigation

Interstate Commerce Commission (1925), 98 I. C. C. 298

MEYER, *Commissioner* :

[The report refers to *United States v. New York Central Railroad*, 263 U.S. 603.]

After announcement of the opinion of the Supreme Court, we entered an order on March 3, 1924, reopening the case for further proceedings. Further hearings were held on September 24 to 27, inclusive, and on November 25, 1924. Briefs have been submitted and the case has been argued orally before us. . . .

The act of Congress pursuant to which we initiated this proceeding, as we pointed out in our original report [77 I. C. C. 200], "is mandatory in that it directs us, after notice and hearing, to require each carrier by rail subject to the act to issue 'interchangeable mileage or scrip coupon tickets,'" and, "it is discretionary in that we may prescribe either an interchangeable mileage ticket or a scrip coupon ticket, and the prescribing of terms, conditions, rules, and regulations rests also within our discretion." As further stated in the original report, "It is also left to our judgment to determine after notice and hearing the 'just and reasonable rates' at which the form of ticket prescribed shall be issued."

The questions remaining for determination are therefore: (1) What will be the "just and reasonable rates" for the interchangeable scrip coupon ticket we shall prescribe to be issued. [That part of the report

which deals with the other questions is omitted, as are also the statistical data introduced as evidence by the traveling salesmen and the carriers.]

It is the contention of the traveling salesmen that we should enter an order requiring, as we did in our former order, that carriers issue and sell the scrip coupon ticket in the denomination of \$90, subject to a discount of 20 per cent. In general, it is the contention of the carriers that we should not require them to issue and sell the interchangeable scrip coupon ticket at a price less than the basic or standard rate of fare. The evidence that has been presented covers a wide range and is not in all respects relevant to the specific inquiry as to what will be just and reasonable rates for the ticket in question. . . .

Even a casual examination of the data presented in the table confirms what has been previously stated in regard to the practical impossibility of attributing changes in the volume of passenger business and the revenues derived therefrom exclusively or chiefly to one particular factor. . . .

The improvement in the revenues of the carriers since 1920 is stressed in the briefs, and properly so. It does not follow that since this improvement in the revenues leaves a possible margin for concessions in rates, the passenger business, and especially a fractional part of this business, is entitled to be the sole beneficiary of this financial improvement. . . .

It is, of course, not possible to appraise accurately the effects of motor-vehicle transportation on passenger business. With the increased transportation of persons by means of motor vehicles there has also unquestionably been an increased use of such vehicles in the transportation of property. Similarly, it is impossible to determine how, if at all, general business depressions or revivals may affect freight traffic differently from passenger traffic. If it were demonstrable that passenger fares are so high that they have had the effect of curtailing passenger travel, it would probably follow that a reduction in all passenger fares rather than in the fares of a particular class of passenger traffic would be the proper remedy.

One of the contentions advanced by the traveling salesmen was that for a great many years railroads have issued mileage and scrip tickets interchangeable between carriers, which have been sold at substantial reductions below standard one-way fares. The practice of carriers in this regard continued until the Director General of Railroads abolished it during the period of Federal control. When the properties were

returned to their owners at the end of Federal control the carriers continued the new practice instituted by the director general, which was that of the issuance of interchangeable mileage tickets, sold, however, at the same rate per mile as standard one-way passenger tickets.

Considering the long period of time during which carriers issued the interchangeable mileage books at reduced rates, the traveling salesmen draw the inference that carriers must have favored tickets of that kind because they tended to encourage passenger travel, and they contend that while continued the practice was not considered to be discriminatory because there were no complaints of discrimination concerning it. . . .

The carriers deny that they ever had in use a mileage scrip coupon ticket which was interchangeable in the sense the amendment now under consideration contemplates that such tickets shall be interchangeable. The tickets formerly in use were interchangeable for the most part between the issuing carrier and affiliated carriers or carriers in the same general territory. The interchangeable scrip coupon ticket now in contemplation is one which will be interchangeable between a great many railroads operating in all parts of the country. As stated in our original report, the carriers insist that the mileage ticket had its inception in the desire of carriers to prefer large shippers, prior to the time when such preferences were prohibited by law, and that for a long time prior to Federal control they had sought an occasion for abolishing the practice of selling such tickets at reduced rates. The carriers deny that it was their belief or that their experience indicated that such tickets stimulated passenger travel.

Concerning the provisions of Section 22 with respect to mileage tickets prior to the amendment of August 18, 1922, the carriers contend that these went no further than to permit the issue and sale of such tickets at rates to be fixed and published in the same manner as other joint rates were to be fixed and published. They draw attention to the distinction that whereas such tickets when issued voluntarily by carriers were to be permitted to be sold at reduced rates, under the amendment they will be required to issue and sell such tickets at a reduced rate if we find such reduced rate to be just and reasonable, and they question our authority to make such a requirement.

We think it is obvious that the interchangeable scrip coupon ticket contemplated by the amendment differs from any of the mileage tickets heretofore in use, particularly in respect to its general interchangeability. The record indicates furthermore that the interchange-

able tickets which were formerly in use were issued voluntarily by carriers prior to the time when regulation of their rates and fares became effective. Our attention has not been called to any instance where regulating authorities have required carriers to issue and sell such tickets at rates below the standard one-way fares prescribed by such authorities.

Those who contend that carriers should be required to issue interchangeable scrip coupon tickets at reduced rates direct attention to the fact that upon the whole the results of operation of the carriers have been more favorable since 1920 than they were at the time when we authorized an increase in the basic or standard fare from 3 cents to 3.6 cents per mile. . . .

The carriers did not earn in 1920, and have not as a whole earned during any year since 1920, the fair return prescribed by us. The traveling salesmen contend that this fact does not preclude us from requiring that interchangeable scrip coupon tickets be sold at rates below the standard one-way fare. We are directed to require the issue of such tickets at just and reasonable rates, and we do not consider that the failure of carriers as a whole to earn a fair return would preclude us from fixing rates for interchangeable scrip coupon tickets at rates lower than the standard one-way fare if we could find that such reduced rates would be just and reasonable. . . .

It is the contention of the traveling salesmen that a scrip coupon ticket sold at a reduction of 20 per cent below the standard one-way fare would not result in an actual reduction of the passenger revenues of the carriers, for the reason, as they contend, that the sale of the ticket at the reduced rate would stimulate travel sufficiently to compensate carriers for losses in revenues which would result if the volume of travel did not increase. We stated in our original report :

That some additional traffic would be created by a scrip ticket at reduced rates may fairly be assumed, although it is impossible to determine how much. . . .

A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that would tend to cause a fuller utilization of passenger-train facilities without overcrowding would also tend to reduce the average cost per passenger-mile.

We find nothing in the record made at the hearings since the reopening of this proceeding which leads us to a conclusion different from the foregoing as stated in the original report. There are estimates

of reductions in passenger revenues that would result if the scrip coupon ticket were sold at various percentages of reduction, but for the most part these estimates are not founded upon experience or other reliable data. These are, however, to be considered side by side with estimates, founded upon no better bases, of the added revenues that would result from increased travel at reduced rates.

At the further hearing following the reopening of the case, a considerable amount of testimony was introduced by the traveling salesmen in an effort to show that sale of the interchangeable coupon ticket at a reduction involves what is equivalent to selling at wholesale in commercial transactions. They also introduced evidence to show that public utilities in many instances establish lower rates for users of large amounts of the service which they render. Carriers contend on the other hand that there is nothing akin to the wholesale principle in the proposed issue and sale of an interchangeable scrip coupon ticket at a reduced rate. They urge that the fact that the ticket will be generally interchangeable, and that if not used entirely within the period of one year from the date of its sale the unused portion may be returned to the issuing carrier and the passenger will be charged for the coupons used at the regular one-way fare, are incompatible with the principle involved in wholesale commercial transactions.

At the further hearing the traveling salesmen did not insist upon the contention they had made at the earlier hearings to the effect that the sale of an interchangeable scrip coupon ticket at a reduced rate might be likened to the practice of carriers in establishing commodity rates for transportation of carload quantities.

The evidence does not establish that any commercial practice closely resembles the issue and sale of a scrip coupon ticket at a reduced rate. Such a sale has been referred to as in effect an exchange of money for a cheaper money to be used in the purchase of railroad transportation. The wholesale purchase of a large quantity of merchandise is usually coupled with a definite agreement as to the time and method of delivery, as well as the quantity purchased. On the other hand, the holder of a scrip coupon ticket may use any amount of it at any time he may desire during a year from the date of purchase, and may call upon any carrier required to honor the ticket for delivery of the particular transportation service which the holder of the ticket may require of that carrier. The commercial wholesale transaction is between a single seller and a single purchaser. The sale of the scrip coupon ticket is in the first instance a transaction between one who purchases

and one carrier which sells the ticket, but the delivery of the transportation service involves many transactions between the holder of the ticket and all other carriers which will be obliged to look to the carrier who sold the ticket for a redemption of the coupons which they collect.

It has been pointed out that the reduced rates for large consumption that are accorded by public utilities apply to the local service for which the demand and quantity of consumption can be forecast with reasonable accuracy and certainty, with the result that the operation of the plant can be arranged in advance to take care of the calls for service.

It is obvious that there are many circumstances in wholesale commercial transactions and in the granting of reduced rates for public-utility services which differ widely from the circumstances surrounding the sale and use of scrip coupon tickets. . . .

A large element of guesswork and speculation is inherent in the very nature of the particular problem with which we are called upon to deal. There are so many factors of uncertainty relating to the volume of the passenger traffic, varying proportions of the classes of traffic which make up the total, changing conditions under which that traffic is conducted, the multitude of conditions which affect operating expenses and other similar uncertain factors, that a categorical answer or a definite finding is impossible. If all the factors which influence a given traffic situation are known and the effect of each of the factors has been measured, and its influence in the past determined, and if, further, these factors are known not to change but probably to remain the same in the future, it is relatively easy to determine the future effect of contemporary action. However, in rate, traffic, and operating matters this is rarely if ever the case. Not only do the factors themselves change, but their relationship to one another changes, with the result that future effects and probable outcomes are necessarily in this sense guesses and speculations. The most that anyone can do is to express a guess or a speculation, informed, restricted, and regulated by the facts of record. While this is especially true of passenger cases, it is to some extent true also of every important rate case involving a large territory, a great variety of commodities, and a multitude of changes in individual rates. . . . All general reductions and increases in passenger fares are so intimately connected with other matters than the fares themselves that a categorical answer to the question of probable effect of changes in rates affecting one class of travel can only be

surmised with many reservations, while statistical proof is practically impossible. While there is a limited amount of information in the record relating to the supposed effect on the volume of the passenger traffic of changes in rates, there is not sufficient to enable one to base conclusions thereon with any degree of confidence. It is probably correct to assume that the paucity of definite information in the record along these lines is due to the inherent difficulty of securing such information. How is it possible ever to determine what proportion of a given number of passengers travel within a stated period of time, because there has been a change in the level of the passenger fare? . . . As a matter of common sense it looks reasonable to suppose that the sale of an interchangeable mileage or scrip book at a reduced fare would increase the number of salesmen who travel. The number of other people who would avail themselves of such a book is much more uncertain and the probable effect on the total passenger movement and the revenues to the carriers are still more uncertain. Uncertainties are cumulative.

Bearing in mind the admonition of the Supreme Court that in administering the amendment to Section 22 we must exercise our own independent judgment, we conclude that sound policy dictates that the basic fare should be the same for all classes of travelers and that we should require no departures from this rule, unless it can be clearly shown, as it has been shown in connection with certain commutation fares, that we are dealing with a class of passenger business which can be so completely segregated that a rate of fare differing from the basic fare should be applied. We find the basic or standard rate of fare for one-way tickets is, and for the future will be, a just and reasonable rate for the interchangeable scrip coupon ticket we shall direct carriers to issue. . . .

As was clearly established in the present record, the carriers have issued and are issuing a variety of tickets at reduced rates. This is a matter that properly rests within the discretion of the respective managements. We should not be called upon to become the general managers of the railroads in this respect. It should be left with the managements themselves to decide whether or not the interests of the carriers and the public which they serve can be promoted by the issue of interchangeable mileage or scrip tickets at reduced rates or by the issue of other forms of reduced-rate tickets. Our duty should be performed when we have established a reasonable basic fare and when we have determined that other classes of fares are free from unjust

discrimination and undue prejudice or preference. There is nothing in this record to establish that the failure of the carriers to issue interchangeable mileage books at reduced rates has resulted in violation of Sections 2 or 3. The carriers individually and collectively are free to experiment with reduced-rate mileage or scrip tickets. Nothing said herein should be construed to the effect that we object to experimentation on the part of the carriers individually or collectively with interchangeable or mileage scrip tickets. In fact, nothing but an experiment can prove the effect, under present conditions, of a scrip ticket at reduced rates; and the best experiment will leave much room for doubt. But in view of the decision of the Supreme Court we have performed our duty upon this record when we require the carriers to issue interchangeable scrip tickets at the basic fare. . . .

Referring to the interchangeable scrip ticket coupon generally in use we said in our original report herein, p. 205:

On June 10, 1918, the director general abolished all mileage books and established in lieu thereof for the convenience of travelers an interchangeable scrip coupon ticket of denominations of \$15, \$30, and \$90, sold at the standard fare, and good on all passenger trains operated by railroads under Federal control. At the expiration of Federal control the carriers continued the use of this form of ticket in the same denominations. This ticket, which is still in use, is interchangeable among practically all carriers by rail except electric and short-line carriers.

In view of that condition and of the fact that the statistics which have been submitted as evidence in this case relate in the main to Class I steam railroads, we conclude that our requirement that the scrip coupon ticket be issued and sold should be limited in its effect to Class I steam railroads, and to their interstate passenger traffic, and that all electric carriers, those included for accounting purposes in classes other than Class I, and all switching and terminal companies, should be exempted from this requirement. This conclusion, however, is not intended to prevent any carrier subject to the act from issuing or honoring the interchangeable scrip coupon tickets, if it desires to do so, and complies with the requirements of the law relating to the filing and publishing of tariffs, and adopts reasonable rules and regulations generally applicable to such tickets.

The interchangeable scrip coupon tickets now in use are issued in denominations of \$15, \$30, and \$90. We conclude that carriers should continue to issue them in these denominations. These tickets are also generally valid for payment of the passenger fare for one or more

persons traveling at the same time. We approve their use in that manner, and conclude that such use should continue.

Our direction as to observance of rules and regulations at present generally in effect should be regarded as tentative. We shall hold this proceeding open to afford travelers and carriers every opportunity to present reasons for changes and modifications in such rules and regulations as may be found to be necessary or desirable. . . .

[Commissioners EASTMAN, CAMPBELL, and McMANAMY concurred in the result.]

COX, *Commissioner*, dissenting:

. . . I believe it unquestionable that the so-called basic fare is higher than the traffic will bear to large numbers of people under many circumstances. . . .

It is axiomatic that high rates do not always produce high revenues. A percentage increase in rates does not produce a like percentage increase in revenues, as experience has so often shown us. Neither does a decrease always spell ruin, as the better earnings subsequent to the general reductions of 1922 prove. . . . Passenger travel by railroad needs a stimulus, and I know of none better than the reduction of fares to the class of people who are inclined to travel often or for long distances by rail. The carriers themselves so admit in the liberality of rates and terms which they offer under excursion tickets. . . .

Quantity consumption is recognized by lower prices in many lines of trade and by many public utilities. The \$90 scrip book at a 20 per cent reduction is merely a contract with the purchaser that he with [will] travel at least 2500 miles within the year in consideration of a reduced rate. The amount of travel per capita in the United States in 1923 was about 350 miles. This would mean that for every \$90 scrip book sold the purchaser would agree to travel more than seven times the average number of miles traveled per capita in 1923, or an addition of six persons for the average distance traveled. It is my thought that if the reduction would so stimulate travel as to keep up the normal trend, as shown by a study of the trend over a period of years, the revenues of the carriers would show an increase rather than a falling off. We recognize by lower rates the greater use of railroad facilities, both as to longer movement and greater volume in the freight-rate structure. . . . The Congress has created a class of passengers and called upon us to fix just and reasonable rates for that class. In fixing these

rates we should apply the common principle of business which we recognize in fixing freight rates.

Reduced rates applied to quantity travel would admittedly increase travel. No one can say with mathematical certainty by what amount. Neither can the carriers with greater certainty prove that the reduction will result in a net revenue loss. . . .

It is my opinion, based upon the record, that passenger travel would so increase that the net revenues of the carriers from passenger-train operation would not be reduced by establishing and maintaining an interchangeable scrip coupon ticket in the denomination of \$90, to be sold at a reduction of 20 per cent from the face value of the ticket, and that rates resulting from such a reduction would be just and reasonable.

QUESTIONS

1. What would the traveling salesmen have to prove to make out a "clear case" (*United States v. New York Central Railroad*, 263 U. S. 603) for interchangeable mileage tickets at reduced rates?

2. What advantages are there in such tickets issued at the standard rate for one-way tickets?

3. Compare the arguments for commutation tickets and for interchangeable mileage tickets at reduced rates.

4. Do you think that the Commission satisfactorily disposes of the argument, based on wholesale rates for quantity consumption, which Cox uses to justify the application of the class-rate theory to passenger traffic?

5. Does not the Commission's admission as to the highly speculative character of its "guesses" relative to the effect of changes in rate upon passenger traffic raise a serious question as to whether it is justified in changing passenger rates at all?

6. Since a "categorical answer or a definite finding" as to the relation of rate changes and passenger traffic is "impossible," does not the opinion close the door to interchangeable mileage tickets at reduced rates unless they are voluntarily issued by the carriers?

[D]

In the Matter of Intrastate Rates within the State of Illinois

Interstate Commerce Commission (1925), 102 I. C. C. 479

*Supplemental Report on Further Hearing*McCHORD, *Commissioner* :

In the original report in this proceeding, 59 I. C. C. 350, we required carriers by rail in the state of Illinois to make certain increases in their intrastate passenger fares corresponding to the increases theretofore authorized for the Eastern group, which includes the Illinois district, in order to remove undue prejudice to interstate passengers, unjust preference of and advantage to intrastate passengers, and unjust discrimination against interstate commerce. We announced that our findings were exclusive of commutation and other multiple forms of tickets, and that such excluded fares and charges would be reserved for further consideration. . . .

In general terms, the matter in issue at this time is, whether the North Western should, as it seeks authority to do, increase its commutation fares within the state of Illinois by amounts not exceeding 20 per cent above the level of such fares in effect August 25, 1920. The multiple forms of tickets issued by petitioner are known as 10-ride and 25-ride bearer tickets limited to one year from date of sale, and 60-ride monthly individual tickets limited to the calendar month for which sold. . . .

Tickets to bearer good for 10 rides are today upon the level in effect in April, 1897, increased by only 10 per cent June 10, 1918. Bearer tickets for 25 rides have changed their level since 1894 only to this extent : April 10, 1912, approximately 10 cents per ticket, or 0.4 cent per ride, was added, and June 10, 1918, these rates were increased by 10 per cent. Monthly tickets, good for 60 rides by one individual during a calendar month, have had no general changes for thirty-four years other than an increase ranging from 30 to 40 cents per ticket, or from 0.5 cent to two thirds of a cent per ride, effective April 10, 1912 ; and June 10, 1918, these rates were increased by 10 per cent. In view of the changes which have occurred since the year 1914, of the increased cost of labor and materials, and of the higher levels of other charges for transportation, the static condition of these commutation fares is noticeable. . . .

The districts served by petitioner are well settled and the commutation travel along its lines is very great. The main drift of such travel is to and from Chicago, and peak loads are carried inbound in the morning and outbound during the afternoon. To accommodate its patrons petitioner has developed a suburban train service in addition to its through, or long-distance, interstate train service, and holders of commutation tickets are entitled to travel on through trains as well as on suburban trains, subject to certain necessary operating restrictions. There are suburban trains which begin and end their trips at Wisconsin points, such as Kenosha. Holders of through commutation tickets from other Wisconsin points, such as Lake Geneva and Janesville, may travel on through trains or on suburban trains to and from Chicago; and it is apparent, therefore, that interstate traffic, through and suburban, and suburban intrastate traffic are quite thoroughly mixed.

The basic charge for one-way passenger fares interstate and intrastate in Illinois and Wisconsin is the same, 3.6 cents per mile. Commutation fares for travel between points in Illinois and points in other states, including Wisconsin, were increased 10 per cent June 10, 1918, at the time that such fares applying intrastate in Illinois received a like increase, and 20 per cent effective August 26, 1920; but no increase of 20 per cent has yet been made in commutation fares between points wholly within Illinois. The results are illustrated by what is shown below:

BETWEEN CHICAGO, ILLINOIS, AND	DISTANCE	ONE-WAY FARE	ONE-TRIP 10-RIDE TICKET	ONE-TRIP 25-RIDE TICKET	ONE-TRIP 60-RIDE MONTHLY TICKET
	<i>Miles</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
Winthrop Harbor, Illinois .	45	161	80.3	70.4	21.4
Kenosha, Wisconsin . . .	52	188	121	102	29.5
Richmond, Illinois	61	219	115	93.5 ¹	None
Genoa City, Wisconsin . .	63	226	143	116 ¹	None

... By elaborate exhibits the North Western attempts to show that its suburban Illinois intrastate fares, as a whole, fail to pay the actual out-of-pocket costs of performing the services. Before looking at the results indicated, however, it may be well to see just what these services are. ... To accommodate this heavy daily traffic, approximately 34,000 passengers inbound to Chicago every week-day morning and an equal number outbound every week-day afternoon, petitioner has

¹ Individual tickets.

provided 533 passenger coaches and 83 locomotives, which are used exclusively in this service. This equipment is of as high grade as is owned and used by the North Western in through transportation. Suburban coaches, however, average only 40.5 miles per day, whereas coach runs for the whole road operated by petitioner average 133.5 miles per day. This result is due to the peak character of suburban travel morning and evening. . . . Storage space for these coaches must be provided at Chicago and along the rails of petitioner at lay-over points. At Chicago 23,500 feet of track are used exclusively for the storage of suburban coaches, and other terminal and lay-over points have a total storage capacity in excess of 33,500 feet used exclusively in this service. The storage time of coaches in these yards approximates an average of 10 hours per coach per day of 24 hours, and approximately 890 coaches are stored in these yards each day. . . . While in storage at the yards these coaches are cleaned, and the record shows that coaches used in suburban service need and receive more frequent and more thorough cleaning than road equipment gets. Within the suburban zone, moving over the same trackage layout and using the same terminals, petitioner's suburban trains, through trains, and other equipment movements must be governed by interlocking plants. There are 24 of these plants, which employ 135 men and control 1207 switches. From midnight to midnight there are 8382 movements through them. Of these movements, 3247, or more than 38 per cent, are of suburban trains; 1033, or a little over 12 per cent, are of through trains; and only 417, or less than 5 per cent, are of freight trains. . . .

The percentage of miles run to miles paid, confining our attention to the suburban districts of petitioner, for both trainmen and engine-men ranged from 93 to 99 per cent for through service, whereas in the suburban service the range is from 52 to 87 per cent. This is due to the character of the suburban service as described above.

We come now to consider the statistical and accounting exhibits of record and, without reciting these in the minute detail in which they are shown, the substantial facts to be drawn therefrom are as follows: Petitioner's entire system had 42,748 employees in 1912, 51,729 in 1918, and 47,288 in 1924. These worked in 1912, 130,195,230 hours, estimated; in 1918, 154,444,349 hours, actual; and 125,436,891 hours, actual, in 1924. The average compensation per hour was 25.08 cents in 1912, 46.8 cents in 1918, and 61.49 cents in 1924. Put in another way, the average annual compensation per employee was \$764 in 1912, \$1397 in 1918, and \$1631 in 1924. Taxes for the entire system were

\$3,422,838 in 1912, \$5,497,481 in 1918, and \$9,348,842 in 1924. As compared with prices paid in 1912, the costs of materials during 1924 were higher by the percentages which follow: Oak crossties 97 per cent, switch and bridge ties 74 per cent, rails 58 per cent, and coal 37 per cent. Plainly stated, the costs of most things petitioner must buy have been increased by from 50 per cent to more than 120 per cent above their costs prior to the World War; whereas, commutation fares for approximately 60,000 intrastate rides per day, as compared with approximately 8000 through interstate rides per day, have been increased only 10 per cent during the same period.

Upon the showing made, petitioner has failed to earn 5.75 per cent upon the cost of its road and equipment, including materials and supplies, since 1920; and the shortage for the calendar year 1924 was more than \$12,000,000. While the investment figure does not necessarily indicate the value of petitioner's property, in the instant circumstances we may use it in estimating the cost of the particular service. Using accounting methods approved by us, petitioner estimates that the expenses and taxes incurred in the performance of its suburban services, above described, exceed the revenues derived therefrom by more than \$1,297,900. A further estimate indicates that, even though commutation fares for intrastate transportation in Illinois be increased by 20 per cent, as here sought, there will still be a deficit in the revenues from this service in excess of \$600,000. In other words, petitioner's suburban fares in the Chicago district, interstate and intrastate, do not pay and will not pay anything toward a return upon petitioner's investment, and the increases sought are expected merely to reduce the out-of-pocket loss. . . .

No competitive influences holding these fare levels down are shown, but there are other carriers serving the same general suburban districts, and petitioner attempts to make its commutation fares relatively just as between the three intrastate districts served by it and without undue preference or prejudice to any district or place. Therefore it will not be necessary to examine all the varieties of multiple tickets or the rates and charges to all stations. The situation here presented may be fully shown by taking stations at distances approximately five miles apart and following the line of the Milwaukee division northward from petitioner's Chicago terminal. Nor will it be necessary to show present fares, inasmuch as the rates sought are in every instance merely 20 per cent higher than the present rates, subject to a maximum charge of 2 cents per mile in deference to the state statute.

BETWEEN CHICAGO AND	DIS- TANCE FROM CHICAGO	ONE- WAY FARE	10-RIDE BEARER, LIMIT 1 YEAR (INCREASED 20 PER CENT)			25-RIDE BEARER, LIMIT 1 YEAR (INCREASED 20 PER CENT)			60-RIDE MONTHLY INDI- VIDUAL, LIMIT CALENDAR MONTH (INCREASED 20 PER CENT)		
			Per Ticket	Per Ride	Per Mile	Per Ticket	Per Ride	Per Mile	Per Ticket	Per Ride	Per Mile
	Miles			Cents	Cents		Cents	Cents		Cents	Cents
Cuyler	5.4	\$0.21	\$1.10 ¹	11.0	2.00	\$2.45	9.8	1.81	\$5.28	8.8	1.63
Calvary	10.4	.39	1.98	19.8	1.90	4.23	16.9	1.62	7.79	13.0	1.25
Kenilworth	15.2	.56	2.78	27.8	1.83	5.88	23.5	1.55	8.72	14.5	.95
Braeside	20.7	.76	3.77	37.7	1.82	8.00	32.0	1.54	9.45	15.7	.76
Fort Sheridan	25.7	.94	4.23	42.3	1.64	9.05	36.2	1.41	10.30	17.2	.67
Lake Bluff	30.2	1.10	5.68	56.8	1.88	12.02	48.1	1.59	11.56	19.3	.64
Waukegan	35.9	1.30	7.20 ²	72.0	2.00	15.32	61.3	1.71	13.20	22.0	.61
Zion	42.1	1.53	8.40 ²	84.0	2.00	19.14	76.6	1.82	14.52	24.2	.57
Winthrop Harbor	44.4	1.61	8.80 ²	88.0	2.00	21.12	84.5	1.90	15.45	25.7	.58

¹ No change.² Rate based on 2 cents per mile per ride.

A statement showing the proposed commutation fares between Chicago and stations on the Chicago & North Western Railway Milwaukee division, with the rate per ride and the rate per mile, is shown in the table on page 395.

This table discloses that the rates sought are reasonably low. It is not feasible to enter into all the statements of comparable fares in effect elsewhere submitted by petitioner to show how reasonable these charges are for distances exceeding 20 miles. In Commutation Fares on N. Y., N. H. & H. R. R., 101 I. C. C. 703, we approved certain increased commutation fares between points served by the New Haven and the Grand Central Station in New York City. Taking comparable distances, the 60-trip monthly tickets there approved and here proposed show the following relationships:

	DISTANCE	FARE	AVERAGE PER RIDE	RATE PER MILE
	<i>Miles</i>		<i>Cents</i>	<i>Cents</i>
Approved	30.3	\$16.48	27.46	0.90
Sought	30.2	11.56	19.30	.64
Approved	35.7	17.60	29.33	.82
Sought	35.9	13.20	22.00	.61
Approved	42.1	20.21	33.68	.80
Sought	42.1	14.52	24.20	.57
Approved	44.4	21.32	35.53	.80
Sought	44.4	15.45	25.70	.58

One direct method of measuring the levels of the rates sought by petitioner is to compare them with the levels of similar commutation fares now in force on the Chicago, North Shore & Milwaukee Railroad, an electric carrier, ordinarily referred to as the North Shore line or North Shore electric. The North Shore line uses the elevated loop tracks in the heart of Chicago, which use carries with it transfer privileges throughout Chicago by way of the elevated system. North of Chicago to Milwaukee the North Shore serves the same general district and communities, and substantially parallels the rails of petitioner which constitute its Milwaukee division. Beyond the 15-mile zone all 60-ride commutation fares sought by petitioner will be very much below the cheapest fares available by the North Shore. For the zone from 15 miles to 30 miles north of Chicago petitioner's proposed 10-ride tickets, and for the zone 15 miles to 35 miles north of Chicago its 25-ride tickets, will be cheaper than similar fares by the North Shore.

Obviously, many reduced-fare multiple tickets usable by bearer offer temptations to defeat one-way fares, which are upon a materially higher basis from points beyond; and this temptation the commutation fares here sought, or any basis below standard fares, would perhaps only lessen. Without following the figures in detail, it is clear that from points in Wisconsin, such as Janesville, Genoa City, Lake Geneva, and Kenosha, to Chicago, both single-trip and multiple-trip fares may be defeated by using single-trip tickets, or, where they are in effect, multiple-trip tickets, to points in Illinois close to the Wisconsin State line, such as Harvard, Richmond, or Winthrop Harbor, and from those points using multiple-trip tickets to Chicago. The record indicates not only the possibility of this practice but that it has grown during the years since 1920. . . .

We find that there are no conditions within Illinois justifying the maintenance by petitioner of intrastate commutation passenger fares and of charges for multiple-trip commutation tickets therein lower than the corresponding fares and charges applicable to the interstate transportation of passengers by petitioner to, from, or through the state; and that the maintenance of such intrastate fares and charges lower than the corresponding just and reasonable interstate fares and charges established and maintained by petitioner pursuant to the authority heretofore given by this commission in Ex parte 74 gives an undue preference and advantage to persons traveling in intrastate commerce on petitioner's lines within said state and subjects persons traveling in interstate commerce on petitioner's lines to, from, or through the state to undue prejudice and disadvantage, and unjustly discriminates against interstate commerce, which undue preference and prejudice and unjust discrimination should be removed.

We further find that, to remove the undue preference and prejudice and unjust discrimination found to exist, petitioner should establish and maintain intrastate commutation passenger fares and charges for multiple-trip commutation tickets for the transportation of passengers on its lines within Illinois which shall be respectively higher by 20 per cent than those in effect on said lines and applicable to said transportation on August 25, 1920, subject to a maximum of 2 cents per mile.

An order in accordance with the foregoing findings and conclusions will be entered.

QUESTIONS

1. Enumerate the factors recognized by the Commission as entitling the North Western to the increase requested.

2. Should you expect to find it the rule that commutation rates lag behind one-way fares in a period when fares are increasing? Why?

3. What justification is there for such a wide spread between one-way fares and the one-trip fares on commutation tickets as is shown in the tables given in this case?

4. From the account of its suburban service given by the North Western, should you conclude that the cost of suburban service is greater than that of through service?

5. Why should not the income from the suburban service, standing by itself, be expected to pay the actual cost of performing that service plus a reasonable return?

6. On the showing made in this case, would a group of through shippers using the North Western have a good basis for complaint to the Interstate Commerce Commission that they are unfairly discriminated against by the commutation fares, since they are forced to bear the deficit arising from the suburban service?

7. Can you explain the inequalities appearing in the table showing proposed rates? For example, why should not the rate per mile on all ten-ride tickets, regardless of distance, be two cents?

8. Why should there be such a pronounced discrepancy between New York suburban rates and Chicago suburban rates as is shown in the last table?

9. Should you not expect that the increase in population in the Chicago metropolitan district would result in an increase in the number of passengers carried one mile and a corresponding decrease in the number of passenger-locomotive miles required to perform the service, so that the cost of the service per passenger-mile would be lower?

10. How would you determine the proper limits of a commutation district? However they are determined, is there not an unfair discrimination between points just inside the district and points just outside it?

11. Can the Commission require interstate carriers to establish commutation rates in the first instance?

12. If the North Western withdrew all its commutation rates, could communities affected, or the Interstate Commerce Commission on its own initiative, compel their restoration?

13. Are party rates (lower rates given to a party containing more than the certain number of persons) commutation rates within Section 22?

14. Can a carrier give commutation rates (or party rates) to certain classes, such as theatrical performers or school children, and refuse them to persons not within the designated classes?

15. Are commutation rates subject to Section 4 of the Interstate Commerce Act?

c. SPECIAL RATES ON IMPORTS AND EXPORTS

[A]

[The pertinent statutory provisions are found in Section 28 of the Merchant Marine Act of 1920 (I. C. Act, pp. 179-180).]

[B¹]

Washington, D.C., March 15, 1924

HONORABLE ELLISON D. SMITH

United States Senate, Washington, D.C.

My dear Senator: This will refer to our conversation of March 12, at which time you requested information with respect to Section 28 of the Merchant Marine Act. . . .

A general certification with respect to all traffic was made to the Commission by the Shipping Board soon after the act was passed in 1920 and the Commission accordingly suspended its operation and it has never heretofore applied. On February 29, 1924, the Shipping Board transmitted a certification dated February 27, 1924, which was received by this commission on March 1, to the effect that adequate facilities now exist as to "all commodities except grain transported between ports of the United States and ports of Great Britain and northern Ireland and the Irish Free State, the ports of continental Europe north of and including Bordeaux and the east coast of Asia, the islands of the Pacific Ocean, Australia, and the East India Islands and the ports of Central and South America."

The Commission construes the law as requiring it to lift the suspension of said section in accordance with the certification of the Shipping Board, and accordingly by an order entered on March 11 such suspension was lifted with respect to the traffic above described, effective May 20, 1924. The order was not made effective immediately because of the necessity that sufficient notice be given to enable carriers to amend their tariffs in an orderly way in compliance with the Interstate Commerce Act, and in order that all parties interested may be fully advised in advance and that as little confusion and disturbance of commercial conditions as possible will result.

¹ Hearings before the Commission on the Merchant Marine and Fisheries. House of Representatives, Sixty-eighth Congress, 1st Session, on H. R. 8091 [a bill to amend Section 28 of the Merchant Marine Act of 1920], pp. 590-594.

A law which in many cases will undoubtedly bring about higher rates over American railroads when the traffic is moved beyond the ports in foreign vessels than when it moves in American vessels, apparently affects the rights and interests of foreign countries and there is always the possibility of retaliatory measures on the part of such countries. But, in acting upon the certification from the Shipping Board, the Commission was not, as you will appreciate, permitted to consider any ultimate question of policy such as whether the law will in all cases operate in the interest of American commerce or whether it may result in complications with foreign countries. The Commission feels that these are questions of policy which are not for it to decide.

This letter will therefore be devoted to calling attention to a few possible results to carriers and ports of the United States of making effective the provisions of Section 28. With the exception of grain and its products and of a few other commodities, there are in fact few export and import rates designed primarily to encourage exportation or importation. Export and import rates lower than the domestic rates are rather generally in effect to and from ports on the South Atlantic, Gulf, and Pacific coasts, but in large measure these rates were devised primarily to equalize the flow of traffic through the various ports. Such rates were generally constructed by ascertaining the lowest domestic rate to or from any port available from or to a given point and then applying that rate, or one based thereon, as an export or import rate to or from other ports. For example, from most points in the large manufacturing region termed central territory comprising Ohio, Indiana, Michigan, and portions of Illinois and a few other states, in most instances the lowest domestic rates to any port are those to New York. Export rates have therefore been established from such points to ports on the South Atlantic and Gulf coasts substantially the same as the domestic rates to New York, which export rates are lower than the domestic rates to the South Atlantic and Gulf ports. Such an adjustment is rather generally in effect to Charleston, Savannah, and Jacksonville, as indicated by a statement transmitted to you in January showing rates on a number of commodities from Cincinnati, Cleveland, Detroit, Chicago and other points to Boston, New York, Charleston, Savannah, and Jacksonville. A similar adjustment is generally maintained to Boston, to which the domestic rates are higher than to New York, while to Baltimore, Philadelphia, and Norfolk the rates are generally based differentially under New York. To Pacific ports the export rates from interior points are generally

constructed by ascertaining roughly the through charge from a given interior point to a foreign destination through New York and then subtracting from such through charge the ocean rate from Pacific ports to destination, the effect being to result roughly in the same through charge to Asia via Pacific ports as via New York.

The purpose of the port equalization basis of constructing export and import rates is to bring about a more or less even distribution of the traffic through the various ports, particularly with respect to the great volume of manufactured articles produced in the territory north of the Ohio and Potomac rivers and east of the Mississippi River. Most of this tonnage would naturally flow through the North Atlantic ports where no export rates provided to South Atlantic, Gulf, or Pacific ports because the general level of domestic rates in that territory is lower and the distances are less than to Southern and Western ports.

Heretofore export and import rates have applied without regard to the character of vessel transporting the traffic to or from the port, but when the provisions of Section 28 become effective the carriers will be prohibited from applying export and import rates lower than the domestic rates unless the traffic is transported beyond the port in an American vessel. Using Charleston as an illustration, if approximately one half of the vessels which have heretofore served that port have been foreign vessels, in future no traffic moved in such foreign vessels can be brought to Charleston from central territory except on rates materially higher than those applicable to New York, assuming, of course, that the carriers do not reduce the domestic rates to the export basis, which they are not likely to do, because of the probable effect upon traffic to and from intermediate points through the requirements of the fourth section of the Interstate Commerce Act. Inasmuch as, with the exception of grain and its products, automobiles, iron and steel articles, and agricultural implements, there have been few export rates to New York lower than the domestic rates, it will still be possible for foreign vessels at New York to compete for export traffic without handicap as to the rail rates to the port. Presumably the application of Section 28 will have a tendency to cause foreign vessels to concentrate at ports such as New York, where they will be subject to no inland-rate disadvantage, thus lessening the service available to and from other ports, and even where foreign vessels continue to serve ports where export and import rates will no longer be available to them, the tendency will probably be to create higher

through charges via such ports, because there is always the possibility that the American vessels serving such ports will in part at least absorb the difference between the rail rates applicable for themselves and for the foreign vessels. Therefore there is a strong probability that Section 28 will lessen the number of vessels serving ports other than New York, Philadelphia, Baltimore, and Norfolk, and will bring about higher rates through such other ports. Both of these changes will naturally tend to increase the tonnage handled through the four ports named and to lessen the tonnage through other ports, thus depriving not only the ports but the carriers serving such ports of traffic which they now enjoy, and concentrating such traffic through the more or less congested Eastern ports.

The above discussion has related to export traffic from and import traffic to the important and densely populated Eastern territory. Port equalization to and from other points is also quite common, but not on the same basis. For example, the lowest domestic rates on cotton from Oklahoma to any port are those to Galveston. These rates have been extended to apply as export rates to New Orleans, Mobile, and in some cases Pensacola, and in that instance the tendency will be to increase the tonnage through Galveston and lessen it through New Orleans and Mobile. Nevertheless it should be borne in mind that the high-grade traffic represented by manufactured articles exported from or imported to the densely populated area in the East is important even to vessels primarily intended to transport cotton or grain from Southern ports. Importation from Europe consists almost wholly of manufactured articles and naturally foreign vessels engaged in traffic to and from points in the United States would prefer to receive cargoes of grain, cotton, or other commodities at a North Atlantic port to which they may bring import traffic in the reverse direction, if they are to be handicapped in the handling of inbound cargoes through other ports. . . .

In its thirty-fifth annual report to the Congress for the year 1921, the Commission called attention to this situation in the following language:

The effect which the operation of Section 28 may have upon the flow of commerce through different ports, and the possible resultant injury to some ports, merit the serious consideration of the Congress. Rail carriers, in making export or import rates, frequently group the ports in a given region, such, for instance, as the Gulf region, and the lowest domestic rate to or from any port in the group upon the particular description of traffic under consideration

is published as the export or import rate on that traffic to or from all ports within the group. The grouping is of benefit to shippers as well as to the ports affected, each one of which is nearer to some points of origin, and more distant from others, than any of the other ports. It follows that between certain origins and certain ports export or import and domestic rates are on a substantial parity. Even in the absence of such grouping the difference between the export or import and domestic rates to or from various ports is materially greater in some instances than in others. When Section 28 becomes operative it is probable that export and import shipments moving in foreign vessels will seek the ports having the lowest domestic rates and at these ports the foreign vessels will be able to compete upon practically equal terms with the United States vessels.

The ultimate effect of Section 28 may be merely to divert traffic from certain ports to others with little or no gain in tonnage for United States vessels.

The adequacy or inadequacy of shipping facilities afforded by vessels documented under the laws of the United States may vary from time to time dependent upon market conditions and the hazards of operation. It may become desirable when adequate shipping facilities at particular ports are afforded by vessels so documented, to terminate the suspension of the operation of Section 28 with respect to those ports but not as to others. Subsequent developments may make renewed suspension necessary. The construction and maintenance of port facilities are costly, and if the use of ports is to be made variable and shifting under the operation of this section that cost will be reflected in varying proportions in the charges to be borne by the shipping public.

Another aspect also merits careful consideration. A large part of our exports of grain, for example, move by rail under transit arrangements which permit of elevation, storing, grading, or other treatment within a limited period, as, for instance, twelve months, at the transit point, and forwarding on the balance of the through rate in effect at the time and from the place of original movement. If Section 28, now suspended, should become operative shipments of grain could thereafter be carried in the same train from the same elevator to the same port for the same foreign vessel, on some of which the balance of the through export rate, which was in effect perhaps a year before, will be collected, and on other of which the higher domestic rate must be collected. If for some cause the suspension should be renewed, grain which had left the country elevator while Section 28 was operative would still take the domestic rate from the transit point and grain originally shipped during the new suspension would take the export rate, although moving together from the same market to the same port for the same foreign vessel. The difficulty of policing such situations will be great. Moreover, grain dealers at primary markets name prices to foreign purchasers on grain delivered at the port. The purchasers arrange for the vessel and the dealer cannot tell, in naming his price, whether or not a foreign vessel will be selected by the purchaser. Obviously the dealer's risk of loss will be great, and the effect upon commerce most prejudicial.

In our judgment the Congress should take such action with respect to this section as may be necessary to obviate unnecessary conflict with the needs and usages of inland transportation.

The recent certification of the Shipping Board excepts grain but not grain products or other articles usually subject to grain or grain-products rates, and therefore the above-described difficulties with respect to transit grain products will probably be encountered when the lifting of the suspension of Section 28 becomes effective. There has always been a close relationship between the rates on grain and on its products. To except grain and not grain products means that while the former may still move to the ports on export rates, flour and other products will take export rates lower than the domestic basis only when shipments are moved beyond the port in American bottoms. Presumably the effect of this will be to handicap American millers in competition with foreign millers buying American grain, as the latter will be able to take advantage of any low ocean rates to foreign markets which may be offered by vessels under flags other than the American, while the former will not, unless domestic grain rates to the ports be reduced to the export basis. This, as above stated, it is very unlikely the carriers will do, and the Commission can require such a revision only in a formal proceeding after full hearing, and then only if the domestic rates are shown to be unreasonable or otherwise unlawful.

In closing it may be mentioned that in its reports for 1922 and 1923 the Commission adhered to its previous recommendations, but no action thereon has been taken by the Congress.

Yours very truly,

H. C. HALL,
Chairman

[C]

In Re Section 28 of the Merchant Marine Act, 1920

Interstate Commerce Commission (April 19, 1924), 88 I. C. C. 645

[The order of the Commission of March 11, 1924, lifting the suspension of Section 28, effective May 20, evoked many protests of shippers, traffic associations, and commercial bodies, and a petition was filed by the National Industrial Traffic League and others requesting a postponement of the effective date.]

BY THE COMMISSION :

... The National Industrial Traffic League takes the position that the certificate of the United States Shipping Board upon which our order of March 11, 1924, was based, is so informal that it is not in compliance with the statute, and affords no legal basis for our action in terminating in part our previous orders of suspension of the section. This contention we do not sustain. We regard the certificate as sufficient to evidence to us the opinion of the board that adequate shipping facilities are afforded by American documented vessels.

Many matters were called to our attention upon the hearing which bore upon the question as to whether in fact the facilities afforded by vessels documented under the laws of the United States were or would be adequate for the transportation of both import and export traffic passing through ports of the United States to the foreign territory indicated. It was urged upon us that the certification by the United States Shipping Board was in effect advisory, and that we possessed jurisdiction and owed the duty to go behind that certificate and determine the facts as to the present and future adequacy of American vessels, as a prerequisite to the exercise of our discretion in terminating or not terminating our previous suspension of the provisions of Section 28.

Numerous instances were cited by shippers where it would appear that violations of some provision of the Interstate Commerce Act would result from a compliance with our order in the manner stated by the rail carriers as in contemplation by them, that is, by restricting the application of the import and export rates, and certain related practices, to shipments moving by American documented vessels. The representative of the rail carriers stated that they had prepared for publication master tariffs, effectuating such restriction in application, which could be filed and posted in time to comply with our outstanding order. However, certain additional complications were developed upon the hearing which had not been brought to their attention, and for which they had no immediate answer. In the application of a master tariff such as indicated, we may expect that there will result many conflicts with provisions of the Interstate Commerce Act, notably the prohibitions contained in Section 1 of unreasonable rates, Section 2 as to unjust discrimination between persons, localities, and commodities, and Section 3 as to undue preferences. Violations of Section 4 may possibly result.

In determining our powers and duties in the premises, we must

have recourse to the intent of Congress as indicated in Section 28 of the Merchant Marine Act, 1920. That expressed intent we must effectuate in spirit as fully and promptly as possible. The wisdom or unwisdom of the policy is not for us to determine. It is clear that Congress intended to and did prohibit the charging or collecting by any common carrier of export or import rates lower than domestic rates for transportation subject to the Interstate Commerce Act of traffic moving to or coming from any port in a possession or dependency of the United States, or in a foreign country, by vessels not documented under the laws of the United States, unless adequate shipping facilities are not afforded by vessels so documented, and then when and as evidenced by the certificate of the United States Shipping Board. The only saving feature as against the application of the prohibition immediately upon the taking effect of the statute is that contained in the provisions of Section 28 itself for a suspension of the prohibition by our order, upon such certification by the shipping board. Such powers as we possess as to the removal of the prohibition are exercisable only upon certificate by the board. As an administrative tribunal, created by the Congress, we must exercise our powers under Section 28 to further the intent of Congress as indicated in that section, and not to halt, delay, or defeat the intent of the lawmaking body.

We are of opinion that Section 28 does not confer upon us any power to review the certificates made to us by the board, or to determine the facts as to adequacy of shipping facilities independently, or otherwise than as certified to us by the board. Congress has delegated to us no power to amend or repeal Section 28. Nor has Congress authorized us to substitute our judgment for the opinion of the shipping board, as certified to us, in determining, when we act under Section 28, whether American shipping facilities are in fact adequate.

The Merchant Marine Act, 1920, does not repeal any provision of the Interstate Commerce Act. The extent to which compliance by a carrier with Section 28 may justify acts which otherwise would constitute a violation of the Interstate Commerce Act, we need not here determine. But common carriers subject to the Interstate Commerce Act must also comply with Section 28 whenever it becomes effective. Our power under Section 28 extends to fixing in our order lifting the suspension of that section such a reasonable effective date as should enable the carriers subject to the prohibitions of that section to comply with both statutes in an orderly way, and to avoid violations of law by bringing their tariffs into conformity with Section 28,

in so far as that may be done, while observing the mandates of the Interstate Commerce Act.

Upon consideration of the record, including the matters submitted to us at the hearing, we find that the present effective date of our order of March 11, 1924, should be extended from the present date, May 20, to June 20, 1924, and it will be so ordered. This additional period should be utilized by the rail carriers in the endeavor to adjust their schedules so that the rates which will be put in for the purpose of complying with the mandate of Section 28 of the Merchant Marine Act will conflict as little as possible with the outstanding provisions of the Interstate Commerce Act, and minimize the disturbance and controversy as to the application of the respective statutes.

POTTER, *Commissioner*, dissenting:

I think our order of March 11 should not have been made and that it should be vacated.

Section 28 of the Merchant Marine Act contemplates that the suspension shall continue as long as shipping facilities are inadequate. It was our duty to be satisfied by competent and sufficient evidence that ample facilities existed before we lifted the suspension. Someone should have the responsibility of making a finding to that effect before the taking of such drastic action. In what we do we act as a commission under the Interstate Commerce Act. We should have had a hearing to establish the fact in the regular and usual course. We were required to give to the certificate of the shipping board only such weight as we thought it entitled to. The board did not make a finding of fact, but merely expressed an opinion which at most was only evidence. The legal effect was only to call upon us to inquire. It did not control our finding. The statute provides that after the receipt of the certificate we may act, not that we must. It contemplates that we shall perform our duty in accordance with established practice under the Interstate Commerce Act. The provision authorizing us to fix terms and conditions indicates that we should rely upon our own judgment and discretion and that we have the responsibility.

QUESTIONS

1. Why should carriers be permitted, under any conditions, to make special rates on imports or exports?
2. What was the purpose of the restriction imposed by Section 28 of the Merchant Marine Act?

3. Is Section 28 consistent with the provision of the Constitution that no preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another?

4. Do you agree with the opinion of the Interstate Commerce Commission that the act requires it to lift a suspension of the section in accordance with the certification of the shipping board?

5. Is there no way by which shippers can secure a review of the findings of the shipping board as to the adequacy of American vessels?

6. Can the Commission order the railroads to make special import and export rates after lifting the suspension of the section?

7. Ascertain whether the operation of Section 28 since 1924 has produced the results apprehended by the Commission.

11. RATE STRUCTURE INVESTIGATION

[A]

[The so-called Hoch-Smith resolution, approved by the president on January 30, 1925, is a combination of resolutions introduced into the Senate (S. J. Res. 107) and the House (H. J. Res. 141) in the Sixty-eighth Congress, as the result of a widespread feeling that the agricultural depression could to some extent be relieved by lightening the transportation burden placed upon agricultural products. The broad scope of the investigation is due to the insistence of the House, which felt that "the present freight structure, which has grown up piecemeal and is a result of all sorts of local considerations, has long been out of adjustment." The House Committee on Interstate and Foreign Commerce criticized especially the flat, horizontal percentage increases in freight rates which have been made in recent years as not scientific and grounded in expediency, and complained that the present structure has borne particularly heavily on agricultural products and "does not give proper weight to the question of what the traffic can fairly bear" (see House Report No. 867, Sixty-eighth Congress, 1st session). The text of the resolution as adopted will be found in I. C. Act, pp. 86-87.]

[B¹]

Hoch-Smith Resolution

In our last report we stated that under Docket No. 17000, "Rate Structure Investigation," instituted upon our own motion to carry

¹ Forty-second Annual Report of the Interstate Commerce Commission (1928), pp. 63-68.

out the mandate of the Hoch-Smith resolution, there were in progress, or about to be begun, eleven separate inquiries covering class rates or important commodities or commodity groups. Hearings in seven of these inquiries have been concluded, briefs have been filed in five and a proposed report has been issued in one. One additional inquiry has been begun, part 4-A, rates on refined petroleum products from, to and between points in the Southwest. These parts, and their present status, are as follows:

Part 2, Western trunk-line class rates. This investigation into the class rates within Western trunk-line territory, and between that territory and all of the United States east of the Mississippi River and Lake Michigan is discussed in some detail in our last report. . . . The two examiners who heard the testimony are now engaged in preparing a proposed report for service upon the parties. . . .

Part 3, cotton. In this part, which deals with cotton rates from all producing sections of the country to all destinations to which cotton moves, including the ports, hearings have been concluded. . . .

Part 4, petroleum and petroleum products. Under Docket No. 18458 we entered upon a general investigation into the interstate rates on petroleum and its products within the territory on and east of the Mississippi River and the Indiana-Illinois state line and from points without to points within that territory. . . . Hearings have been concluded and briefs filed. . . .

Part 4-A, petroleum and its products from, to and between points in the Southwest. . . . It is expected that hearings in this part will be commenced during January, 1919.

Part 5, furniture. By order entered May 10, 1926, we instituted, upon our own motion, an investigation into and concerning the classifications, class and commodity rates, carload minimum weights, packing and loading requirements, and all other elements or factors necessary to a determination of the questions, whether the ratings, rates and charges applicable to the interstate transportation of furniture, in carloads and less than carloads, between all points in the United States are unreasonably high or low, are unduly prejudicial to or preferential of particular localities, persons, or descriptions of traffic, or are in any other respect in violation of the Interstate Commerce Act, with the view to the entry of such orders as may be necessary to correct such violations as may be found to exist. . . .

The initial hearing, at Chicago, in May, 1928, has been followed by hearings on the Pacific coast, where furniture is manufactured, dis-

tributed, and sold and at Kansas City, Missouri, for the convenience of manufacturers, distributors, and retailers of the Southwest. A hearing will be had at Atlanta, Georgia, in December, 1928, for the benefit of the Southeast, and will be followed, early in January, 1929, by a hearing at New York for the convenience of the Eastern interests, including those of New England. A final hearing, exclusively for rebuttal purposes, will be held at Washington.

Part 6, iron and steel investigation. The hearings herein were concluded on June 18, 1927. . . .

Part 7, grain and grain products. At pages 69 and 70 of our last report the scope of this inquiry was described at length. The hearings at Dallas, Wichita, and Minneapolis, there mentioned, have been supplemented by hearings at Chicago, Seattle, Portland, and Los Angeles. . . .

Part 7-A, grain and grain products, Southern territory rates. Following various requests this inquiry was instituted upon our own motion into the rates on grain and grain products within Southern territory and from Western district and central territory to destinations in Southern territory. . . . Part 7-A will be conducted as a continuation of part 7 and it is anticipated that definite assignments of hearings will be made early in 1929.

Part 8, cotton seed, its products, and related articles. This proceeding, as stated in our last report, is a country-wide investigation of the rates on cotton seed, cotton linters, and cottonseed-hull fiber or shavings, but not cotton; cottonseed meal, cake, and hulls and other vegetable meals and cakes used for feed, including copra, peanut, palm, palm-kernel, soya-bean, and flaxseed meal and cake, but not flaxseed or other grain and grain products; cottonseed and other vegetable oils and oil foots, including coconut, peanut, palm, palm-kernel, soya-bean, and linseed oils and foots, also corn oil, olive-oil foots, and fish, whale, and sea-animal oils and foots, but not cooking oils or lard substitutes; and inedible greases, tallow, and soap stock. It embraces between sixty and seventy formal complaints and numerous fourth-section applications. Hearings have been held in New York City, Minneapolis, St. Louis, Los Angeles, Fort Worth, San Antonio, Houston, Dallas, Chicago, New Orleans, Atlanta, Memphis, and Biloxi, and will be continued during the month of November at Chicago and New York. It is expected that the evidence of all defendants and respondents will be concluded at the further hearing scheduled at New York on November 19, 1928. . . .

Part 9, live stock. This is an inquiry into the rates and regulations

governing the transportation of edible live stock in the territory west of Chicago and the Mississippi River, and throughout the South. . . . Hearings have been concluded and briefs filed. Proposed reports are in course of preparation.

Part 10, hay. As stated on page 71 of our last report an inquiry into the transportation of hay within the Western group had been instituted. . . . Hearings have been held at Fort Worth, Denver, St. Paul, and Chicago, in coöperation with commissioners of the railroad or public utilities commissions of the twenty-five states included in the Western district. Additional hearings throughout the Western district will be held during the winter months.

Part 11, sand and gravel. Hearings in this part have been concluded in so far as they relate to the interstate and intrastate rates on sand, gravel, crushed stone, shells and related commodities taking the same rates in carloads between points in Arkansas, Oklahoma, Texas, and Louisiana west of the Mississippi River and also including both banks of the Mississippi River bordering on Louisiana and Arkansas. . . .

A proposed report therein will be issued at an early date.

QUESTIONS

1. Do you think the criticism of horizontal rate increases made by the House Committee is a just one?

2. Give your opinion of the policy enunciated in the resolution; namely, that prevailing conditions in different industries should be an important factor in determining freight rates.

3. How far is it "legally possible" to consider these conditions in fixing rates without amending the Interstate Commerce Act? What are the lowest possible lawful rates under the Interstate Commerce Act?

4. Does the resolution authorize the fixing of any lower rates for agricultural products than the Commission could have fixed before its passage? If not, what does the third paragraph of the resolution amount to?

5. Is the second paragraph of the resolution merely directory in character, or would the Commission have been unable to undertake the general investigation therein described without the special authority conferred by the resolution?

J. ECONOMIC BASES OF RATE FIXING

[No attempt can be made in this section to present a complete or detailed treatment of the economic bases upon which the Interstate Commerce Commission's rate decisions rest. The complexity of the subject would make its complete treatment cover far more space than

may be given to it in a book of this nature. It is assumed that students who make use of this book will be familiar with the economic treatment of the subject which appears in the several textbooks on railroad transportation.

The selections that follow, then, are not intended to be a comprehensive consideration of the economic bases of rate-fixing. They are simply illustrative of the way in which several important economic factors concerned in rate-making have been considered by the Commission. The student will find it of value to take any volume of the ordinary decisions of the Commission and, after reading a number of the decisions, attempt to classify the economic principles which appear in them.]

1. COST OF SERVICE

[A]

[Attention is directed to the discussion of various cost factors contained in the Transcontinental Rate Cases of 1922, IV, *H*, 3, *supra*.]

[B]

Adriatic Mining Company et al. *v.* Chicago & North Western Railway Company et al.

Interstate Commerce Commission (1923), 78 I. C. C. 611

Division 1, Commissioners McChord, Aitchison, Esch, and Lewis

BY DIVISION 1 :

This proceeding relates to rail rates and charges on iron ore from mines in Minnesota and Michigan to the holds of vessels at the Lake Superior and Lake Michigan docks, in which it is reshipped by water to lower lake ports. The iron deposits in the Lake Superior region are the largest in the world and are the main source of supply for the steel industry of the United States. There are six principal ranges in that region, three of which, the Marquette, Menominee, and Gogebic, are in the western portion of the Upper Peninsula of Michigan, and the others, the Mesabi, Vermillion, and Cuyuna, in northern Minnesota. The most important of all the ranges is the Mesabi. Its output is almost double that of the other ranges combined. . . .

At the outset it should be stated that the 55-cent rate . . . was pre-

scribed by us in *Lum v. G. N. Ry. Co.*, 33 I. C. C. 541, decided April 5, 1915, hereinafter called the Lum case. That decision dealt with the rates from the Mesabi Range to vessels at Two Harbors, Duluth, and Allouez Bay, and, after an exhaustive investigation, we reduced the 60-cent rate then in effect by 5 cents. At about the same time, in *Newport Mining Co. v. C. & N. W. Ry. Co.*, 33 I. C. C. 646, we approved a charge of 5 cents per long ton for dock service by carriers serving the Michigan ranges in addition to the line-haul rates, which at that time were 40 cents to Ashland from the Gogebic Range and to Escanaba from the Menominee and Marquette ranges. . . .

The complaint herein was filed December 24, 1920, by eighty-seven corporations which operate iron mines in the Lake Superior region. Complainants are identified with the so-called independent steel interests, as distinguished from the United States Steel Corporation and its subsidiaries, one of which, the Oliver Iron Mining Company, operates extensively in Minnesota and Michigan ranges. The original complainants produce about one half of the total output of the entire region. They allege that the rates and charges assailed are unreasonable, and we are asked to establish rates which shall not exceed the cost of performing the service plus reasonable annual return on the value of the property devoted to this use. They also allege that the present rates are violative of Sections 2 and 3 of the Interstate Commerce Act. After the publication of the increases made by the Michigan lines in February, 1921, a supplemental complaint was filed, assailing those rates. . . .

The ore produced in the Lake Superior region varies widely in value and physical characteristics and is mined under varying conditions, all of which have an important bearing on the service performed by the railroads in transporting it from the mines to the holds of the vessels at the docks.

The mines are generally two types, shaft and open pit. Open-pit mining predominates on the Mesabi Range, but, with the exception of the Cuyuna Range, where the tonnage from the two is nearly equal, the production from the other ranges is almost entirely from shaft mines. Most of the mines are some distance, usually not more than five or six miles, from the main tracks of the railroads and are reached by a system of mine tracks and spurs. Empty cars are distributed to the mines by switch engines operating from assembling points where the loaded cars are assembled into solid trains to be hauled to the docks.

At open-pit mines the railroads deliver empty cars and receive loads at the mine yard. The service beyond is performed by locomotives owned and operated by the mining companies. At shaft mines loading is from either mine pockets or stock piles. On the Gogebic Range slightly more than half of the ore is loaded from stock piles. On the Missabe railway stock pile ore constitutes about 40 per cent of the total, and on the Great Northern only about 15 per cent. For pocket-loading a string of empty cars is spotted by a switch engine on a track extending beyond the tippie at an upgrade. The cars are then moved down by gravity for loading at the shaft pockets as they are desired. In loading from the stock pile the empty cars are placed on a track constructed alongside the pile and filled by a steam shovel, which must be moved by a switch engine. It is also necessary to shift the tracks at the stock pile from time to time as the pile is depleted. Prior to Federal control the carriers made no additional charge for spotting at the steam shovels or for track-shifting. In April, 1918, the director general published a charge of \$7.50 per hour for the service of a switch engine and crew, and charges covering cost of shifting tracks at stock piles were also imposed on mine operators. Both these charges were voluntarily discontinued by the carriers in 1921. Reconstruction and relocation of tracks in the mining regions is also occasionally necessitated by the caving in of ground where mining operations are conducted in close proximity to the tracks. In a few instances portions of the carriers' main lines have been destroyed in this manner.

Iron ore is hauled in specially constructed hopper-bottom cars, the newer ones being constructed of steel. The steel cars generally have a capacity of 50 tons and the wooden ones 40 tons, though the Great Northern in 1920 acquired a thousand new steel cars of 75 tons' capacity. The average loading of cars handled at the Ashland docks of the North Western in 1920 was 46.7 tons, compared with 43.4 tons for those received at the docks of the same carrier in Escanaba. On the Missabe and the Iron Range the average loading was about 46.1 tons. The average loading for the Great Northern in 1920 was but 43.7 tons, but for July, August, September, 1921, it was 49 tons. The use of these cars is confined to the ore traffic except for hauling a small amount of coal to the mines from the docks, but the loaded return movement is in no case more than 8 per cent and is decreasing as more mines are being operated by electricity.

At the assembling points the loaded cars are consolidated into

trains. The trainloads hauled by defendants in this traffic have increased since the Lum and Newport cases were decided. The trains on the North Western in 1920 averaged 70 cars each. This appears to be a representative average for all the ore-carrying roads except the Great Northern, whose average trainload in 1920 was 4789 tons, or about 109 cars.

Defendants' docks are of various sizes and capacities but are of the same general type. Most of them are constructed of timber, the others being of steel or steel and concrete. Each dock is divided into pockets, ranging in number from 200 to 400, into which the ore is dumped by gravity from the ore cars. Each pocket has a capacity of from two to six carloads. The pockets are provided with chutes, spaced to correspond with the hatches of vessels, by means of which the ore is poured into the holds. The carriers' dock service, for which separate charges are now published, is described in the schedules as follows:

Storage in cars at dockyards, unloading from cars to docks, storage in docks and loading from docks to vessels, if loaded into vessels within ten days from arrival of cars at dockyards.

Each car, as loaded, is graded according to chemical analysis, and the carrier's dock agent is advised of this grade, in order that the ore may be dumped into the proper pocket for loading into the particular vessel for which it is intended. The ore trains are left by the road crews at the dockyards, which are often some distance from the docks proper. Here the cars are weighed and classified according to grade, and, in case no dumping instructions have been received, are stored in these yards, frequently for a considerable length of time. Many switch engines and crews are employed exclusively at the docks and dockyards. The tracks from the yards to the docks are on an ascending grade, and some of them are curved.

Defendants encounter many difficulties in making up the cargoes for the boats, due to the necessity for keeping the various grades of ore separated in the docks. The larger sales companies and the United States Steel Corporation ship ore in straight boatloads of a single grade, but most other cargoes are mixtures. To provide for these mixtures a system of blocks has been devised, each block consisting usually of about thirty-five pockets and containing ore of different grades so combined as to give a mixture of a required chemical content. The work of keeping the various grades separate from each other and dumping the ore in the proper pockets is complicated. Loading instructions are frequently changed by shippers after cars have been

spotted at the pockets, and additional switching is thereby necessitated. Sometimes the boats themselves are shifted from one part of the dock to another in order to secure a certain mixture, causing delays and thus increasing the cost of dock operation. Some economy in dock operation has resulted in recent years from adoption of a grouping arrangement by which similar grades of ores produced by different mining companies are pooled.

Some ore contains a considerable amount of moisture, which prevents it from running freely from the cars into the pockets and from the pockets to the vessels. Handling ore of this character requires the services of laborers, equipped with wooden poles, iron bars, and chisels to loosen the ore from the sides of the cars and the pockets. Much of the ore produced in the Iron Mountain district of the Menominee Range is very moist, as is also that shipped from the western part of the Mesabi Range, which must be treated at washing plants or concentrators for the removal of impurities before it can be used. In the latter part of the shipping season frozen ore, which must be thawed by steam pipe connected with switch engines, presents further difficulties.

The shipping season extends generally from the middle of April until the first week in December. During that period the docks are in continuous operation, including Sundays and holidays. A large number of employees are required in clerical and manual labor, and many of them are on duty in the winter when the docks are overhauled. . . .

Rates from the Minnesota Ranges

At page 554 of our report in the Lum case we said :

However, for the purposes of this case, the complicated questions of the apportionment of property and expenses of the Great Northern can virtually be avoided. The extraordinary profits of the Iron Range and Missabe railway companies cannot be questioned. In construction and equipment the Great Northern must be essentially similar. Its grades are more favorable, and therefore with a similar tonnage its cost of operation cannot be widely different, although the length of the haul is greater. In other words, practically every comparison that can be suggested between the ore lines of the Great Northern and the Iron Range and Missabe points to very large profits on the ore traffic of the Great Northern, perhaps equal to those on the other two roads, and any rate found reasonable for the Iron Range and Missabe will make this traffic profitable to the Great Northern.

In certain of the cost studies submitted by complainants they rely on the language above quoted to justify their application of Missabe and Iron Range costs of handling all freight traffic, of which iron ore constitutes about 90 per cent, as shown by the annual reports of those two lines, to arrive at what they consider a reasonable rate.

Complainants therefore divided the aggregate freight operating expenses of the Missabe and the Iron Range in 1920 by the number of cars of all traffic hauled, arriving at an average expense per car of \$12.018. They say that this may be taken as fairly representing the average cost per car of handling ore over the Great Northern. In 1920 the loaded and empty movement in ore traffic on that line is stated as 567,182 cars, which, multiplied by \$12.018, gives the alleged total ore operating expenses of the Great Northern. Those for the three roads, ascertained as indicated above, are

Duluth & Iron Range	\$5,163,202
Duluth, Missabe & Northern	8,105,985
Great Northern	<u>6,924,555</u>
Total	\$20,193,742

Complainants assign capital charges to ore traffic in the ratio that the ore car-miles bear to the total car mileage. One hundred constructive car-miles are allowed for each loaded car to reflect the forty-eight hours' free time at each terminal. The total capital charges of the Missabe in 1920 are estimated at \$3,140,484. The proportion assigned to ore on the basis just described is \$2,704,802. For the same year the capital charge of the Iron Range assigned to ore is similarly estimated at \$1,625,008. In estimating the capital charge on the Great Northern's ore traffic the number of cars previously computed as moving via that line are disregarded. For them are substituted the average number of total and loaded cars for the Missabe and Iron Range. The total cars are multiplied by the length, in miles, of the ore haul on the Great Northern, to which is added constructive mileage to allow for the free time, as in the case of the Missabe and Iron Range. The total car mileage thus arrived at is multiplied by the average capital charge per car-mile for the Missabe and the Iron Range, which gives the total capital charge assigned to the Great Northern ore traffic. The combined capital charges so estimated are as follows:

Duluth & Iron Range	\$1,625,008
Duluth, Missabe & Northern	2,704,802
Great Northern	<u>2,784,164</u>
Total	\$7,113,974

Adding this figure to the aggregate operating costs shown on the next preceding page gives a sum of \$27,307,716, which, divided by 39,610,530, the number of long tons handled by these carriers, results in a quotient of 68.94 cents. The quotient for the Great Northern alone similarly computed is 76.4 cents. Complainants conclude, therefore, that 70 cents per ton would have been a reasonable rate in 1920, and that, in view of the reduction in operating expenses which has since occurred, the rate from the Minnesota ranges should not exceed 60 cents per ton. In the same manner complainants estimate that the following would have been reasonable maximum rates for the years indicated :

1916	34.75 cents
1917	44.69 cents
1918	49.34 cents
1919	60.30 cents

The Great Northern criticizes these cost figures as throwing no light on the expenses of that line in handling its ore traffic. These criticisms fall under two heads: (1) those which question the accuracy of the figures used for the Iron Range and the Missabe; and (2) those which deny the propriety of applying the costs of those lines to the Great Northern traffic. They will be briefly discussed in that order.

The tons of ore handled by the Steel Corporation roads shown in complainants' figures included a considerable tonnage which did not move over the docks, as they hauled 36,789 cars of ore which was not reshipped by water for the most part, but which was consumed at furnaces in Duluth. The total number of tons which moved at the rate of \$1 is reported by those lines as 25,208,877, or more than 4,000,000 less than the number estimated by complainants. The tonnage figures on all freight used by complainants included nonrevenue freight. The nonrevenue ton-miles of the Missabe in 1920 amounted to about eight tenths of 1 per cent of the total, and because of this fact the estimated number of loaded cars of all freight is said to be too high, since nonrevenue freight loads more lightly than other traffic, and the operating expense per car is accordingly too high. Complainants estimate the number of ore cars returned empty to the mines as averaging 92.4 per cent for the two Steel Corporation roads, but the roads themselves state these percentages to be 93.47 for the Missabe and 95.55 for the Iron Range.

The contention that the Great Northern is unable to haul iron ore from the Mesabi range to its Lake Superior docks as cheaply as the

Steel Corporation roads is supported by a large amount of statistical and operating testimony. In 1912 and for some years prior thereto 50 per cent or more of the ore tonnage of the Great Northern was furnished by mines controlled by the United States Steel Corporation, which, through a subsidiary, had contracted to ship a certain yearly minimum tonnage over the Great Northern. Since the termination of that contract in 1914 relatively little corporation ore has moved over the Great Northern, the amount in 1920 being 527,994 tons, or about 4 per cent. During the five years 1916-1920 inclusive, the ratio of Steel Corporation to independent tonnage handled by the Missabe and Iron Range was about 4 to 1.

The Great Northern contends that its operating costs are higher than those of the Missabe and the Iron Range because its tonnage consists almost entirely of independent ore, and on this point it refers to the evidence introduced by the corporation roads as to the relative cost of hauling corporation and independent ore. The independent ore is classified into a larger number of grades than that shipped by the corporation, requiring a greater amount of switching and dock space. In 1920 the Missabe handled ore from 31 corporation mines in 36 blocks and from 8 independent mines in 15 blocks, making a total of 51 blocks, as against 97 for the Great Northern. From its four docks at Duluth, having 1152 pockets, the Missabe has been able to ship more than 20,000,000 tons a year, while the Great Northern, which has four docks, with a total of 1352 pockets, has never shipped more than about 12,000,000 tons of independent ore a season. On the most efficient of these four docks the Great Northern has never been able to handle more than about 4,700,000 tons of independent ore annually, while in 1912 more than 6,000,000 tons of corporation ore were shipped from it. It is also claimed that the Missabe is able to operate more economically because the corporation ore does not fluctuate in volume from season to season to such an extent as the independent ore. For example, the Missabe ore tonnage in 1921 was 60 per cent of that hauled in 1920, while the Great Northern's ore tonnage declined 65 per cent in the same period.

The Great Northern asserts that its road haul, as well as its dock service, is more expensive than that of the Missabe and the Iron Range. In the Lum case we said that the Great Northern's grades were more favorable and that therefore with a similar tonnage its cost of operation cannot be widely different, although the length of the haul is greater. Operating conditions on the Great Northern have

changed in some important respects since the Lum case was decided. For one thing, the combined tonnage of the Steel Corporation roads in 1920 was more than double that of the Great Northern, while in 1912 it was but 26.5 per cent greater. In 1912 the tonnage of the Great Northern was greater than that of either of the other two roads, but in 1920 that of the Missabe exceeded the Great Northern's. In 1912 the Great Northern had the greatest density of ore traffic, but the Missabe now leads in this respect. The Great Northern still has the heaviest trainload, but the weight of the trainloads of Steel Corporation roads has been increased in much greater degree since 1912 than has that of the Great Northern. By using larger engines the Great Northern is compelled to pay higher wages to its enginemen, and the fuel consumption of its engines is likewise greater. Since the haul of the Great Northern is 50 per cent longer than that of the other two lines, the round-trip time of its trains is greater, resulting in the accrual of more overtime pay to train crews. Overtime rates of pay are now 50 per cent higher than for straight time, while in 1912 there was no difference. The greater track mileage of the Great Northern is reflected in higher charges for maintenance of way, and its heavier trains make for greater car and locomotive repairs. Another factor which tends to make the dock costs of the Great Northern higher than those of the Missabe and the Iron Range is the relatively larger amount of washed ore which it handles. In 1920 washed ore was 20 per cent of the total Great Northern tonnage, while the corresponding percentage for the Missabe was 13.

The Great Northern submits figures to show that if complainants had calculated charges for capital costs and taxes for the Great Northern in the same manner as they did for the Missabe and the Iron Range and used such charges in arriving at a rate, a different result would have been obtained than under the method used, which applied the capital charges for the Steel Corporation roads to the Great Northern. In these figures the investment in road and equipment, including lines in Canada, is taken as \$482,545,410, to which are added amounts representing cash for a working fund and material and supplies, bringing the total to \$505,722,210. Six per cent of this is \$30,343,333, to which is added \$10,050,265 for taxes, making a total to be earned of \$40,393,598. No credit is deducted for capital rents from hire of equipment, for the reason that no such revenue is derived from ore equipment. In 1920 the total number of actual and constructive car-miles was 686,254,189, which, used as a divisor into the

interest and tax charge, makes an average capital and tax charge per car-mile of 5.8861 cents. Each car of ore moves an average of 111.559 miles, and the empty movement is 118.795 miles. Adding 100 constructive car-miles gives a total number of 330.354 for each carload of ore hauled, which, multiplied by the capital and tax charge per car-mile, above stated, gives a charge per car of \$19.445. This figure divided by 43.69, the average number of tons per car, makes a capital and tax charge per ton of 44.5 cents, as against 17.96 cents in complainants' computations.

The Great Northern, however, criticizes the car-mile basis of apportioning capital charges on the ground that it results in an under-assignment to ore. Its representatives point out that the car-mile basis erroneously assumes that the service obtained from ore cars is the same as from others, whereas (1) the empty movement of ore cars is very much greater; (2) the average haul of ore is much shorter; (3) ore cars are not in use the year round but only during the ore-shipping season; (4) ore cars are not susceptible of use in transporting other kinds of freight and cannot be interchanged with other carriers; and (5) ore cars make fewer car-miles (loaded and empty) per year than other freight cars. Assignments based on the relative number of cars, tons, ton-miles, or relative amount of revenue all would be higher.

Complainants' second set of cost figures presents a direct estimate by primary accounts in our classification of the maximum expense assignable to its dock-ore traffic by the Great Northern for 1920. The lines over which this traffic moves are embraced in the Mesabi division of the Great Northern, which includes the main line from Boylston, Wisconsin, to Cass Lake, Minnesota, and from Saunders, Wisconsin, to Allouez Bay, and branch lines to mining points on the Mesabi Range. For about 3 miles from Boylston to Saunders the ore moves over a portion of the Superior division. The Mesabi division consists of 340.32 miles of road, 78.33 miles of second main track, and 258.67 miles of siding, of which 187.78 miles of road, 2.68 miles of second main track, and 204.24 miles of sidings are used exclusively for ore traffic and 95.80 miles of road, 75.65 miles of second main track, and 28.05 miles of sidings are used jointly for ore and non-ore traffic.

The total operating expenses of the Mesabi division for the calendar year ended December 31, 1920, were \$10,274,386.54, of which \$9,852,111.57 is allocated to freight traffic in accordance with our rules. Complainants attempt to divide the amount shown for each primary account into figures which will reflect ore and non-ore

422 GOVERNMENT AND RAILROAD TRANSPORTATION

expense. In so doing they take as their guide our rules governing the separation of operating expenses between freight and passenger service, which went into effect January 1, 1920. As this was not practicable for some accounts, various other methods were used. The sum charged by the Great Northern to maintenance of way and structures for freight on the Mesabi division is \$2,202,968.53. From figures furnished by the Great Northern as to its number of locomotive-miles in ore and non-ore service and cost of fuel per locomotive-mile, complainants estimate that the cost of fuel used in hauling ore was 72 per cent of the total, and this percentage is applied to track maintenance, the largest account under this general heading, to arrive at the amount charged to ore. Maintenance and depreciation of coal and ore wharves are charged directly to ore. Complainants estimate the total assignment of maintenance of way and structures accounts to ore traffic at \$1,707,071.18.

The total expense for maintenance of equipment in 1920 on the Mesabi division was \$2,777,368.75. Repairs to road and yard locomotives were assigned to ore on the basis of locomotive-miles in ore service, and depreciation and retirements of steam locomotives were based on the percentage assignment of locomotive repairs. For repairs to freight-train cars complainants multiply the number of car-miles in ore service by the cost to the Missabe of car repairs per car-mile in 1920. The Great Northern's criticism of this assignment will be later discussed. For depreciation and retirements of freight-train cars \$30 per car for 6765 cars in ore traffic in 1920, or \$202,950, is assigned. Under repairs, depreciation, and retirements of work equipment, the assignment to ore is on the basis of the average percentage used in maintenance of way and structures. The remaining accounts are assigned to ore in the proportion of accounts specifically referred to above. The total assigned to ore under maintenance of equipment is \$1,440,716.44.

In estimating the share of expenses to be assigned to ore under the general account of transportation, figures covering only the period from May to November are used, on the ground that the movement of ore is practically confined to that time. The total transportation expenses for the Mesabi division from May to November, 1920, were \$3,677,278.28. The assignment to ore for dispatching is in the ratio of ore train-miles to the total. The station employees account is assigned entirely to ore, this being an overcharge. The expense for coal and ore wharves during the entire year was also charged to ore alone.

Fuel for yard locomotives used in ore service is based on figures furnished by the Great Northern. This item also represents an overcharge. For other yard expenses the entire amount was assigned to ore. For train enginemen the assignment to ore is based on the percentage of ore-train hours, increased by 4 per cent to reflect higher wage rates paid to engineers and firemen in ore service. Fuel for train locomotives is computed from figures furnished by the Great Northern. Lubricants and supplies for locomotives and trains are assigned to ore in the ratio of car-miles, engine-house expenses on the basis of repairs to locomotives, and charge for trainmen according to train-hours. With minor exceptions all other accounts under transportation are assigned to ore on a composite of the percentages used in other accounts under this heading. The total assigned to ore for the general account of transportation is \$3,306,300.38. Under traffic and general expenses the assignment to ore is \$177,868.27, being 68.93 per cent of the aggregate of such expenses for the year, the average percentage reflected in assignments of prior accounts.

The grand total estimated operating expense for transporting ore on the Great Northern in 1920 is \$6,631,956.27, which, divided by 12,495,732, the number of long tons of dock ore transported in that year, amounts to 53.07 cents per ton.

In determining a capital charge to be assigned to ore the value of the Great Northern's property used in the transportation of dock ore is estimated at \$32,000,000. The tentative valuation for the Great Northern had not been completed by our Bureau of Valuation, but that bureau furnished to complainants certain inventories and engineering reports prepared by its engineering section bearing on the cost of reproduction new and less depreciation of the properties used in ore traffic. Some of the amounts shown therein have been assigned entirely to ore, such as tracks in the range, ore docks, and ore cars. Other items have been divided between ore and non-ore on the basis of relative expenses. So estimated, the reproduction cost new of the property used for ore is stated at \$35,415,915, and less depreciation at \$30,746,029. Complainants therefore contend that \$32,000,000 fairly represents the value of the property on which the capital charge should be based, and that such charge should be \$1,920,000. Dividing this sum by the number of tons hauled in 1920 gives a quotient of 15.37 cents. Since the amount of taxes paid by the Great Northern in 1920 on its entire line was 33.12 per cent of the return to which it claims to be entitled, complainants apply that percentage to the figure

of 15.37 cents to secure the sum of 5.09 cents per ton as a charge to the ore traffic for taxes. Adding 53.07 cents, 15.37 cents, and 5.09 cents, complainants say that a reasonable rate for 1920 would have been 73.63 cents. Estimating that wage and material costs have declined 15 per cent since 1920, they further argue that in fixing the rate for the future the figure for operating expense should be reduced to 45.11 cents, and the total rate therefore should not exceed 65.57 cents. This figure, it will be noted, is 5.5 cents higher than the rate determined in their first cost study. They show that such a rate applied to the tonnage of 1920 would produce gross revenues of \$8,193,451.47, or \$14.87 per train-mile, based on 551,014 train-miles in ore service, for the average haul of 107 miles, compared with revenue of \$8.12 per train-mile on all traffic on the Great Northern during the first nine months of 1920 for an average haul of 276.2 miles.

The Great Northern makes numerous criticisms, both general and specific, of the second cost study submitted by complainants. It contends that the undercharge to ore for maintenance of way and structures amounts to \$400,000, due to the inapplicability of the cost-of-fuel basis of apportioning expenses, shown by a comparison between maintenance costs on the Mesabi division and those on the Northern division, connecting with it on the west, over which no ore moves. No allowance is made for the fact that Mesabi-division passenger and non-ore freight trains run for about ten miles on the tracks of the Superior division, though the fuel is charged to the Mesabi division. Maintenance costs of the Mesabi division are higher than on other portions of the line because of the greater weight of ore trains. Light local freight trains, making numerous stops and doing local switching, burn relatively more fuel than a heavy through ore train, though their light tonnage causes less wear and tear on the tracks.

The undercharges claimed for maintenance of equipment amount to \$800,000. The Great Northern criticizes complainants' failure to allow any depreciation on 950 new steel ore cars which it placed in service in the latter part of the ore-shipping season of 1920. These cars cost \$2500 apiece, and it is therefore contended that the depreciation charge of \$30 would be too low for them. The Great Northern also protests against the use of costs of the Missabe to determine cost of car repairs on its line. It states that no separate record of car-repair costs for the Mesabi division is kept, but that it computes division expenses of this character by dividing the system expense on a car-mile basis. Thus estimated, the repair of ore cars is put at \$1,450,138,

or more than twice complainants' assignment for this account. The Great Northern owns a considerable number of wooden and old steel cars, while those of the Missabe are newer and all steel. The Great Northern trains are heavier, causing greater concussion and stress in stopping and starting. An important source of injury to ore cars is yard switching, and it is therefore pointed out that the larger percentage of independent ore hauled by the Great Northern necessitates more handling, storage, and switching in the yards, as heretofore stated. The Great Northern also shows that a variation in repair costs per car-mile is common even between roads engaged in similar business. For instance, the costs per car-mile for the Great Northern, Missabe, Iron Range, Bessemer & Lake Erie, Pittsburgh & Lake Erie, and Wheeling & Lake Erie in 1919 varied from 0.9 cent for the Missabe to 6 cents for the Pittsburgh & Lake Erie. Answering these criticisms, complainants point out that as most damage to cars occurs in yard switching and the Great Northern's haul is longer than that of the Missabe its costs of repair per car-mile should be lower. They also call attention to the fact that the Great Northern cars are about 0.8 ton lighter than those of the Missabe and that the average load for the latter is 51.6 tons against 48.9 for the former, which, they say, should tend to make repairs less on the Great Northern.

The Great Northern complains that there is an undercharge to ore for transportation expenses, because with the exception of one account, coal and ore wharves, expenses for the period from December to April have been excluded. It further states that 400,000 tons were hauled in April at relatively higher expense because the movement was scattered and the weather was colder. Also, it is said, ore should be charged with its share of other transportation expenses which are in the nature of overhead, continuing throughout the year. Complainants reply to these criticisms by pointing out that many of the bases of separation, such as train-miles, train-hours, and other factors used, reflect the April movement and therefore include its cost.

The Great Northern also attacks complainants' valuation of its ore-handling property at \$32,000,000, contending that this figure should be increased to \$40,000,000. The cost of reproduction new arrived at by the engineering section of our Bureau of Valuation is said to be too low by about \$12,000,000, because of the rise in cost of materials which has occurred since 1914, the date of the price levels upon which the engineering inventory was based. Certain other items which the Great Northern intends to contest when its valu-

ation case is heard by us makes the total undervaluation which it charges about \$18,000,000.

As part of its defense the Great Northern also submits an estimate of the operating expense incurred by it in transporting ore in 1920. It starts with the total operating expenses of the Mesabi division for that year, \$10,274,386.54, previously referred to, of which \$1,293,583.56 is charged directly to ore traffic for depreciation, maintenance, and operation of ore docks. Of the balance \$5,710,345.44 is assigned to freight traffic as opposed to passenger by the method prescribed by us, this figure including station, yard, engine, and train service, loss and damage, locomotive and car repairs, and car renewals and depreciation. The balance, \$2,848,182.57, is divided between freight and passenger traffic on the basis of car mileage, \$2,795,263.34 being assigned to freight. Of the total for freight, \$8,505,608.78, a percentage of 85, is apportioned to ore, that percentage representing the ratio of ton-miles of iron ore to those of all freight traffic on the Mesabi division. The total cost of hauling ore is thus estimated at \$8,586,565, which, divided by the number of tons hauled in 1920, gives a figure of 68.24 cents per ton. In the same manner the cost per ton in 1921, based on figures for the first nine months of that year, is estimated at 78.95 cents per ton.

The method of assigning capital charges and taxes to ore traffic is somewhat similar. The investment in the aggregate property of the Great Northern for 1920 is estimated at \$505,722,210, a 6 per cent return upon which would be \$30,343,333. To this is added \$10,050,265 for taxes, making total capital charges and taxes of \$40,393,598. Of this \$30,393,759, or approximately 75 per cent, is assigned to freight traffic, since the operating expenses for freight traffic were about 75 per cent of the total for the year. After making direct assignments of 6 per cent on the valuations of ore cars, ore docks, and freight cars other than ore, the balance is divided between ore and non-ore on the basis of ton-miles, resulting in a total assignment to ore of \$6,020,424. Dividing this sum by the number of tons hauled in 1920 gives a quotient of 47.2 cents.

The cost figures of the Great Northern are attacked principally on the ground that any allocation of operating expenses on the ton-mile basis ignores the heavier car and train loading of ore than that of other traffic and therefore results in a large overassignment to ore traffic. Numerous counter-exhibits are introduced, restating the Great Northern figures to show costs which might have been arrived at by using a train-mile basis of apportionment and other methods which

would have made the assignment to ore much less. It is unnecessary and impracticable to discuss these restatements further than to state that they bear out complainants' contention that the ton-mile basis does not fairly reflect the actual cost of transporting a heavy-loading commodity such as iron ore. . . .

Adoption of the rigid rule of rate-making urged by complainants could hardly fail to work injustice to the carriers. Though the cost studies submitted by them are conscientiously and carefully prepared, they are at best only estimates, the accuracy of which could be tested only in practice with the possibility of harmful results.

In the Lum case, *supra*, at page 555, we said: "It seems, however, that a reasonable ore rate is one that takes into account both the lean years and the fat years." Complainants' cost studies are based upon a fat year, 1920, in which the shipments from the Lake Superior region were greater than they had ever been except in the abnormal war years of 1916, 1917, and 1918. On brief they say that "a rate which is shown to be reasonable on the basis of the 1920 tonnage and 1920 costs properly adjusted to present cost levels is the correct rate for future application," assuming that the 58,000,000 tons shipped in that year must be regarded as a normal annual tonnage, despite the fact that in the preceding and following years the tonnages were but 48,000,000 and 22,000,000 respectively. The figures available in trade journals indicate that the 1922 tonnage was about 43,500,000 tons. The average annual tonnage for the four postwar years of 1919, 1920, 1921, and 1922 is in the neighborhood of 43,000,000 tons.

The cost per ton of hauling ore undoubtedly varies inversely, in a marked degree, with the volume transported. In 1920 the cost of hauling 19,124,115 long tons of all freight, most of which was ore, on the Missabe Railway was \$9,036,407, or 47.25 cents per ton. In 1921 the same road hauled 10,878,968 tons at an aggregate cost of \$6,457,041, or 59.35 cents per ton. The Iron Range in 1920 carried 10,239,066 long tons of all freight at a cost of \$5,811,134, or 56.75 cents per ton. In 1921 its tonnage was 4,107,068, its total cost \$3,783,203, and its cost per ton 92.11 cents. If, as complainants say, the cost to the Steel Corporation roads of transporting all traffic may be taken as representative of the expense incurred in hauling ore by all the Minnesota lines, obviously their cost per ton in 1921 was much higher than in 1920. In this connection, too, it must be remembered that the slump in ore traffic on the Great Northern, Northern Pacific, and the Soo Line was relatively greater than on the Missabe and the Iron Range.

The variation in tonnage is also an important factor in connection with the allowance for capital charges. In the second cost study for the Great Northern, submitted by complainants, the allowance to ore for a return on investment is \$1,920,000 and for taxes \$635,904, total \$2,555,904. The tonnage of the Great Northern in 1920 was 12,495,732, and each ton of ore would therefore be assessed 20.46 cents for capital charges and taxes. In 1921 the Great Northern hauled but 4,500,000 tons, and the charge per ton for that year would therefore have been 56.79 cents. Assuming that the Great Northern's tonnage in 1922 was 10,000,000, the charge for that year would be 25.55 cents per ton.

It would be impossible to sustain complainants' contention that "the 'key' rate to which all other iron ore rates in this territory must be adjusted is the rate over the Duluth & Iron Range Railroad and the Duluth, Missabe & Northern Railway" without assuming that the costs of those roads are fairly representative of all the Minnesota roads, for in the Lum case we said that where a number of carriers participated in traffic at the same rate but with varying costs of transportation our policy was not to take either the lowest or the highest cost as the standard. The validity of such an assumption is doubtful in the light afforded by this record. Our finding in the Lum case that the cost of operation of the Great Northern could not be widely different than that of the Iron Range and Missabe was predicated, it should be remembered, on similarity in tonnage, and, as has been shown, the spread between the combined ore tonnage of the latter roads and that of the Great Northern grew from about 4,000,000 tons in 1912 to nearly 15,000,000 in 1920. It also seems clear that other changes which have taken place since 1912, previously referred to, have tended to increase the costs of the Great Northern, as compared with those of the Steel Corporation roads.

The rate of \$1 in effect from the Minnesota ranges in 1920 was but 82 per cent higher than the rate of 55 cents established in 1915 by our order in the Lum case, though according to complainants' own estimates the cost per ton of the Great Northern, Missabe, and Iron Range had increased from 23.57 cents in 1916 to 50.98 cents in 1920, or more than 116 per cent. Complainants' rate of 69 cents, estimated as a reasonable maximum for 1920, is 100 per cent higher than their similarly computed rate of 34.75 cents for 1916. It is urged by complainants that with the return of peace they are entitled to a removal of what they term the war-time emergency increase in these rates. In answer to this contention it is sufficient to point out that the cause for

that increase, enhanced operating costs, has been removed only in a small part. While complainants' rates were subjected to a greater increase under General Order No. 28 in comparison with other commodities, that inequality has been entirely wiped out by subsequent readjustments. As a result of general increases and reductions since June 24, 1918, the general level of rates in Western territory is 52 per cent higher than it was on the date mentioned, while the net increase in the ore rates from the Minnesota ranges during the same period has been but 44 per cent. Ore rates shared in the general reduction of July 1, 1922, and the cut then ordered seems to have been fairly proportionate to the decreased costs of operation. . . .

Conclusions

We find

1. That the rate (including charge for dock service) from the Mesabi and the Vermillion Ranges to vessels at Two Harbors, Duluth, and Allouez Bay, and from the Cuyuna Range to vessels at Superior is not unreasonable, unjustly discriminatory, or unduly prejudicial or preferential. . . .

QUESTIONS

1. Define "direct costs."
2. To what extent can direct costs be distinguished in the hauling of ore from the Mesabi Range?
3. What are joint costs? Illustrate them from the material in *B, supra*.
4. Explain the methods of allocating joint costs to a particular article shipped by freight.
5. Differentiate between constant costs and variable costs. Illustrate each from *B, supra*.
6. "The word 'cost' as applied to railway service has several meanings." Illustrate the truth or falsity of this statement.
7. What effort does the Interstate Commerce Commission make to ascertain the general cost of service incurred by the carriers?
8. When a traffic official is seeking new tonnage for his line, what factors of cost of service will he take into consideration?
9. What factors need to be considered in fixing the general level of rates for all lines?
10. "From the economic point of view the only satisfactory rate adjustment is one based solely on the cost of service." Is this true? Explain why or why not.

11. Show how the cost of service enters into the practical problems of determination of rates by the carriers.

12. Under what conditions does the Commission need to consider cost of service in its regulation of railroad rates?

13. Sand and gravel rates from certain zones around Chicago to the city are set at 65, 70, and 75 cents, respectively, when the haul is entirely by one carrier, and at 95, 100, and 105 cents when more than one carrier is involved. What justification, if any, is there for such a difference?

2. VALUE OF SERVICE

a. CLASS AND COMMODITY RATES

[A]

Suspension of Western Classification

Interstate Commerce Commission (1912), 25 I. C. C. 442, 472

The elements of classification have been discussed so many times by the Commission that nothing more is required here than reference to its past utterances.

In *Pyle & Sons v. E. T., V. & G. Ry. Co.*, 1 I. C. C. 465, 473, the Commission said :

In grouping articles together in a class for the purpose of fixing rates upon these articles several considerations are usually deemed by the carrier of a very controlling nature. Among these may be mentioned bulk and space occupied, value, hazardous and extra-hazardous freight, liability to waste or injury in transit, weight, or the like.

In *Thurber v. N. Y. C. & H. R. R. Co.*, 3 I. C. C. 473, 510, the Commission said :

A classification is not a fixed condition to which other interests must necessarily yield. It is the creation of carriers for their own and the public convenience, and may be changed by its creators. If not compatible with the public interests, it should be modified to subserve those interests.

In *Warner v. N. Y. C. & H. R. R. Co.*, 4 I. C. C. 32, 39, it was held that :

Both the market value of the commodities and the volume of business they furnish to carriers are proper elements to be considered in the classification.

In *Harvard Co. v. Pennsylvania Co.*, 4 I. C. C. 212, 223, the evidence showed that the controlling conditions determining the classifi-

cation of goods by the official classification committee were bulk and space occupied, the weight of the package as compared with its dimensions, the value of the goods, the volume of traffic, and whether the goods could be loaded in a car so as to get a full carload. In the case the Commission held :

That a reasonable, fair, and just difference may be made in proportion to quantity hauled of the same article in a full carload and in less-than-carload lots, and respective rates charged upon each according to weight, is a principle that has been often recognized by the Commission. That a rate-maker may, and in fact should, take into consideration . . . such controlling conditions, in preparing a classification, as bulk and space occupied, the weight of the article as compared with its dimensions, its value, whether it can be so loaded into a car as to make a full carload, and whether as a matter of fact it is hauled in carloads as well as in less than carloads, are each and all true. But the mere fact that one article, for example, sewing machines, is shipped "in greater quantities" than surgical chairs, when each as a rule is shipped in less-than-carload quantities, and of no large difference in bulk, weight, and value, and of no appreciable difference in expense of handling and of haul, that this alone should constitute in itself any reason why the former should enjoy lower rates or classification than the latter, merely for the reason that they are shipped "in greater quantities" is a doctrine to which we cannot give our assent. In such a case mere quantity not measured by a recognized unit of quantity adapted to carriage and lessening the expense of handling by carriage, cannot be allowed to affect rates in the transportation of property.

In *Coxe Bros. & Co. v. L. V. R. R. Co.*, 4 I. C. C. 535, 558, the Commission said :

For convenience in making transportation rates and charges, freight is arranged and put into different classes according to expense of carriage, bulk, value, risk, competition, and other considerations affecting the cost and value of the transportation service.

In *Page v. D., L. & W. R. R. Co.*, 6 I. C. C. 548, 565, it was held :

The elements of bulk, weight, value, and character are main considerations in determining approximately what freight articles are so analogous as to entitle them to the same classification.

In *Myer v. C., C. & St. L. Ry. Co.*, 9 I. C. C. 78, 83, it was stated by the Commission :

It has been repeatedly claimed by carriers and repeatedly held by the Commission that in the forming of a classification bulk, value, liability to damage, and similar elements affecting the desirability of the traffic should be considered, and that analogous articles should ordinarily be placed in the same

class. . . . Manifestly in determining what freight rates shall be borne by different commodities an attempt should be made to obtain a fair relation between those commodities, and a classification which utterly ignores all considerations of this kind or which utterly fails to give due weight to such considerations is unjust and unreasonable.

In *National Hay Asso. v. L. S. & M. S. Ry. Co.*, 9 I. C. C. 264, 307, the Commission said :

In a classification such as the official, which contains but six general classes, it is manifestly impossible to bring together in each class only such articles as resemble each other in the elements of character, use, value, volume, bulk, weight, risk, and expense of handling, which have so often been referred to as governing conditions in freight classification. Besides these general considerations affecting classification, competition is often an important factor. Such competition includes not only that between carriers, but also that of a commodity produced in one section with the same commodity produced in another section, and sometimes the competition of one kind of traffic with another.

In *Procter & Gamble Co. v. C. H. & D. Ry. Co.*, 9 I. C. C. 440, 482, the Commission held :

Freight classification is based upon the relations which commodities bear to each other in such respects as character, use, bulk, weight, value, tonnage or volume, risk, cost of carriage, ease of handling, and controlling conditions caused by competition.

In *Planters' Compress Co. v. C., C. & St. L. Ry. Co.*, 11 I. C. C. 382, 405, the Commission held :

No classification can be so minute as to conform to the different varieties and conditions of traffic. To separate different grades or densities of the same article into different classes with varying rates, even if it could be accomplished, would go far to defeat the real purpose of classification, as was held by the Commission in *Derr Mfg. Co. v. P. R. R. Co.*, 9 I. C. C. 646.

In *Stowe-Fuller Co. v. Pennsylvania Co.*, 12 I. C. C. 215, 220, the Commission held :

Classification must be based upon a real distinction from a transportation standpoint. . . . To hold otherwise would be to promote false billing on the part of shippers, and to require the carriers, if they would avoid the penalty of the law, to make a practically impossible examination into the use to which each shipment of these brick was put.

In *Fort Smith Traffic Bureau v. St. L. & S. F. R. R. Co.*, 13 I. C. C. 651, 655, the Commission said :

In *Stowe-Fuller Co. v. Pennsylvania Co.*, 12 I. C. C. 215, we held that classification must be based upon a real distinction from a transportation standpoint. The Commission cannot regard a classification as scientific or a difference in rates as well based which is altogether founded upon a distinction that has no transportation significance. Such a differentiation would lead to an almost endless multiplication of rates, which could find no excuse save the use which might be made of the article transported.

In *Metropolitan Paving Brick Co. v. Ann Arbor R. R. Co.*, 17 I. C. C. 197, 203, the Commission said :

It is well settled that in making a classification of articles bulk, value, liability to loss and damage and similar elements affecting the desirability of the traffic should be considered, and articles which are analogous in character should ordinarily be placed in the same class. . . . Carriers, within proper limitations, may take competition into consideration in classifying freight. Competition that may be considered in proper cases not only includes that between carriers, but also that of the commodity produced in one section of the country with the same commodity produced in another section, and sometimes competition of one kind of traffic with another kind.

In *Forest City Freight Bureau v. A. A. R. R. Co.*, 18 I. C. C. 205, 206, the Commission held :

Classification is not an exact science ; nor may the rating accorded a particular article be determined alone by the yardstick, the scales, and the dollar. The volume and desirability of the traffic, the hazard of carriage, and the possibility or probability of misrepresentation of the article are considerations of prime importance in classification. At best it is but a grouping, and when the approximation resulting from it is not found to cause the exaction of an unreasonable or discriminatory charge it will not be disturbed.

In *In re Advances on Coal*, 22 I. C. C. 604, it was held by the Commission that its power over classification of freight necessarily involves "considerations of the value of service given to the shipper, as well as the cost and value of the service furnished by the carrier." . . .

[B]

Union Tanning Company *v.* Southern Railway Company

Interstate Commerce Commission (1913), 26 I. C. C. 159

. . . Leather is a very valuable commodity, carloads ranging in value from \$7500 to \$12,000. The value per ton is shown to be from \$380 to \$900, and the freight earnings per ton to New York from Johnson

City, Middlesboro, Chattanooga, and Decatur, \$7.60; from Old Fort, \$8.40; Atlanta and Rome, \$9.60. Defendants submit for comparison rail earnings to New York and values per ton on cotton piece goods, lumber, and other commodities originating in the South, as follows:

COMMODITY	VALUE PER TON	FROM	EARNINGS PER TON
Lumber, yellow pine . .	\$30 to \$40	Johnson City and Chattanooga	\$5.70
Cast-iron pipe	\$24	Birmingham and Anniston	6.12
Bark, tanning extract, liquid	\$60	Andrews, Newport, and Old Fort	5.20
Cottonseed oil	\$126	{ Macon	6.00
Cottonseed meal, choice .	\$30	{ Selma	6.20
Cotton piece goods . . .	\$500 to \$2975	{ Atlanta and Memphis . .	5.80
		{ Atlanta	11.60
		{ Charlotte	9.80

The value of a commodity is one of the material considerations in the adjustment of rates, and it is just as unsound to say that rates upon carloads of equal tonnage and equal cost of movement, one of a low-grade, cheap commodity and the other of a high-grade and valuable commodity, should be made the same, except for the difference that might be allowed for the single item of increased risk, as it is to say that every commodity should be charged all it can stand or bear. It is alike in the public interest and just to the carriers, having regard to their entire business and their right to an opportunity to earn a fair return upon the property in addition to the cost of service, that in the adjustment of rates due weight be given to differences in value of the respective commodities carried and that such differences be not limited by the mere measure of difference in risk. Otherwise one of two results would of necessity follow: the rates as a whole would be such that it would be impossible for the carriers to earn what they reasonably might and, in fact, what they of necessity should, in order to enable them to perform their services, or the rates on many low-grade commodities would have to be such that they would be prohibitory of any movement. . . .

While in fixing reasonable rates and relative rate adjustments distance must always be considered as bearing both upon cost to the carrier in performing the service and the value of the service to the shipper, there are many other facts, such as density or sparsity of traffic over and along the lines of movement, comparative cost of construction and operation, and competitive conditions, which must be given

weight. In some situations the other facts and conditions are so nearly uniform or similar that distance becomes the dominating factor in the relative adjustment of rates, while in others distance becomes, within limitations, a minor factor because of the dominating and controlling force of other facts and conditions; hence many striking inconsistencies would be apparent in different rate adjustments made by orders of this and State commissions, as well as voluntarily by the carriers, if examined and compared with regard to distance alone. If the Commission should dispose of these rate questions and controversies by resort alone or mainly to comparative distances, ton-mile earnings, and estimated relative earnings above the estimated so-called "out-of-pocket" cost to the carrier for each service performed, there could always be found standards for the reduction of every rate to the basis of the lowest, whatever may have compelled or induced its establishment. For the Commission to adopt such a course would inevitably lead to a continuous process of reducing the carriers' revenue, a result which would be detrimental to the public interest as well as unjust to the carriers.

Justice and reasonableness, demanded by the law and due alike to shippers and carriers and without which the public interest will not best be served, can only be secured by a careful consideration of all the facts, circumstances, and conditions which legitimately and practically bear upon the question before us. No inflexible, theoretical rule fixing the measure of weight to be given a comparison of distance or other facts, which vary in degree of importance in different cases, can conduce to the determination of the lawfulness of rates, which must be determined by their reasonableness, and the latter is ascertainable only as a question of fact by duly weighing all of the facts standing together in each case.

[C]

In the Matter of Rates on and Classification of Lumber and Lumber Products

Interstate Commerce Commission (1919), 52 I. C. C. 598

McCHORD, *Commissioner*: . . .

Classification Factors: How Reflected

Before considering any other factors, there should be ascertained the bearing upon classification of those factors which are definite and readily ascertainable, such as value, risk, and the relation of weight to

space, which is herein called car-loading. If other influences require a modification of the result, such modification may thereafter be made. The evidence indicates a lack of information on the part of the carriers as to the comparative car-loading and value of the articles here concerned. Almost all the evidence introduced in this respect came from shippers. Carriers should obtain this information by systematic periodical investigation, and should reflect differences in car-loading and value before making a final determination as to rate relationships.

Value is a factor in classification, for two reasons: because carriers incur a greater risk in transporting more valuable articles and because value is generally indicative of the ability of a commodity to pay transportation charges.

While in some instances the differences in the average value of common lumber and some of the other articles here discussed is considerable, the range of values even of common lumber to such an extent embraces the range of values of the other articles under consideration as to make impracticable and unjust a differentiation in rates based on value. The facts with regard to this are given in greater detail in Appendix 2. They support the conclusion that rather than reflect value in a rate relationship between lumber and lumber products this element should be considered only in fixing the basic lumber rate and its relationship to rates on commodities not so intimately related to lumber as those here under consideration. Thereby will be avoided the inconsistency of transporting certain articles at lumber rates and others at higher than lumber rates when such articles are of equal value and of like transportation characteristics.

Moreover, where there is a considerable difference in value it will frequently be found, as, for instance, in the case of millwork as compared with lumber, that the more valuable articles load lighter than lumber and that by reflecting this difference in car-loading a sufficient spread in rates will already have been attained as between lumber and the article concerned.

The difference in damage claims accruing in connection with the movement of lumber and lumber products is not sufficient to warrant differences in rates. Manufacturers of lumber testified that with the exception of heavy timbers, lumber is usually loaded in box cars. Open cars are used only in times of car shortage, and while many of the better grades of dressed lumber could not be shipped in open cars without damage unless housed in with cheaper lumber, as it was testified is sometimes done, certain grades of rough lumber would likewise be in

danger of damage from the elements if shipped in open cars. While lumber moves largely in equipment of the same character as that used in transporting lumber products, it lends itself more readily to shipment in cheaper equipment than certain but not all of the products.

The car-loading of lumber and lumber products constitutes to a very considerable extent the determinative factor in the classification of these commodities. An article to be grouped with lumber may be of comparatively low density, of a shape which does not permit compact loading, or its commercial unit of sale may be such as not to permit a full utilization of the available space in a car. If for these or any other reasons in actual transportation it loads lighter per unit of space than lumber, it must obviously cost more per 100 pounds to transport than lumber.

The average loading of certain of the articles under consideration, such as agricultural implement and vehicle material, cooperage stock, handle material, and veneer is not so different from the average loading of lumber as to require differences in rates. But other articles, such as millwork, built-up wood, and silo material, load lighter per unit of space than lumber, and on this account ought to be accorded higher rates.

In determining what rate relationship will correctly reflect differences in loading characteristics of lumber and lumber products the question arises as to how these rate relationships should be measured. At present articles grouped with lumber in lumber lists are accorded either lumber rates or flat differentials, generally 1, 2, 3, or 5 cents over lumber rates. It is the contention of the Middle Western manufacturers of millwork that the rate relationship of lumber and lumber products, particularly of millwork and lumber, should be expressed in percentages rather than flat differentials. Percentage differences were adopted by the Southern carriers in their proposals made upon the hearing in this proceeding but are of course not suggested except as to lumber and grouped articles made from woods of value in connection with their present proposed lumber list which is confined to articles which should in their opinion be accorded the same rates as lumber manufactured from the same species of wood. The Pacific-coast manufacturers of lumber and of millwork are strongly opposed to a percentage difference, and in this respect are supported by the transcontinental carriers. They contend that there should be no difference in rates between millwork and lumber from the Pacific coast, and that if a difference is to be established it should be expressed in

terms of a flat differential rather than by percentages. Other shippers of lumber and lumber products took no definite stand as to whether their rate relationships should be expressed in percentages or flat differentials.

We believe that a percentage relationship between lumber and related articles will effect a fairer distribution of transportation costs than flat differentials. Class rates uniformly present wider spreads for the longer than for the shorter distances, and in many cases follow strictly for all distances and in others approximately a percentage relation between the classes. Were the entire difference in rates between millwork and lumber justified on the ground of a higher value for the former and the consequent ability of millwork to pay higher rates than lumber, the contention of the Pacific-coast interests that a flat differential should prevail would be valid, for the ability of one commodity to bear a greater share of transportation costs than another is in most cases independent of the length of the haul. But as has been observed, value is not a determinative factor in the classification of lumber and lumber products. The relative car-loading of the articles included in uniform lumber lists is the basis upon which a differentiation in rates should be made. This factor has a direct bearing upon transportation costs. The lighter loading of such articles as millwork increases their cost of transportation in the same proportion, but of course by a greater amount for the longer than for shorter distances. This factor, therefore, cannot be reflected by a flat differential, but requires the establishment of a percentage difference.

It is, of course, evident that a finding upon the facts disclosed by this record that the rate relationship of lumber and lumber products should be based upon their relative car-loading rather than upon considerations of value and risk in transportation does not lead to the conclusion that value and risk should never be regarded as determinative classification factors and that classification should in all cases reflect only such differences in car-loading as may exist between different articles. Still that is the inference which is erroneously sought to be drawn in some of the briefs which were filed in support of exceptions taken to the examiner's proposed report. The value and risk in transportation of lumber and lumber products were given careful consideration. The facts of record show that value and risk in most instances do not afford a basis for a differentiation in rates between lumber and most lumber products. There may be other commodities such as iron and steel where no substantial differences in car-loading exist and

where differences in value are material and afford a just ground for differences in rates, and there doubtless are many commodities in the classification of which many factors, including car-loading, value, and risk, should be considered.

The Pacific-coast interests argue that "the percentage theory is incapable of equitable application to commodity rates in that it takes cognizance merely of transportation conditions and absolutely disregards existing commercial and competitive conditions," in view of which they contend no differential should be observed from the Pacific coast on millwork and lumber. The transcontinental carriers may adjust their lumber rates so as to permit the freest competition in common markets between Pacific-coast lumber and lumber products and the same commodities produced elsewhere. But, as already indicated, they may not, by means of inequalities in their rates on lumber and millwork, confine the production of millwork from Pacific-coast lumber to the Pacific coast. Such disturbances in existing relationships between competitive localities as will result from the rate relationships herein indicated will be necessary in order to remove undue prejudice and disadvantage. This is an entirely different matter from the disturbances of existing relationships between competitive localities which might result from such horizontal increases in rates as were contemplated in The Fifteen Per Cent Case, 45 I. C. C. 303, to which reference was made in this connection by the Pacific-coast interests.

Rate Relationships and Commodity Descriptions

The examiner's report contains alternative conclusions. The first proposal is to promulgate a lumber list, such as that given below, providing rate relationships between the various articles included. The other is to establish different rates for different minima, to be applied to all the articles included in a lumber list.

Differences in car-loading are to a great extent dependent upon the fact that it is impossible to load as great a weight per unit of space of one commodity as of another. The prevailing carload minima also tend to limit the range of loading per unit of space and the car-loading of different commodities is often determined by commercial units of sale. Nevertheless, there are considerable differences in the loading per unit of space by different shippers of the same commodity, and also for different shipments from a single shipper. Some shipments of lumber probably are not loaded heavier than other shipments of

articles of comparatively low average car-loading. It is a defect inherent in the present method of fixing, with few exceptions, only one rate and one carload minimum for each commodity that inequalities of this kind arise in freight rates which are made to reflect the average car-loading of commodities.

The present record does not afford a basis for establishing different rates for different minima. As indicated by the examiner, additional information would be necessary before the details of such a plan could be developed. Nor have the parties had the opportunity to present evidence bearing upon the practicability of adopting such a plan. With respect to the practical application of different rates for different minima for lumber and lumber products, the following questions arise:

1. Is the cubical capacity of cars a sufficiently reliable guide of their loading possibilities to permit rates to be charged in accordance with the weight loaded per cubic foot, or are the differences in the manner of constructing cars such as to cause a material difference in the loading possibilities of cars of the same cubical capacity?

2. Can a shipper's choice of different sizes of cars be so limited as to be fair to him and also prevent too great a burden from falling upon the carrier in furnishing cars of the sizes ordered?

3. Can a two-for-one and large-car-small-car rule, such as would be necessary in connection with different rates for different minima due to the fact that the equipment of the carriers is not standardized but is composed of cars which vary widely in capacity, be applied with equality and fairness? . . .

Commissioners Clark, Meyer and Wooley wrote concurring opinions and Daniels wrote dissenting opinion in which Aitchison and Hall concurred.

[D]

Southern Class Rate Investigation

Interstate Commerce Commission (1925), 100 I. C. C. 513

EASTMAN, *Commissioner*: . . .

Class Percentage Relationships

Only three different proposals with reference to class percentage relationships have been made in this proceeding. They are (1) the original proposal of the carriers, (2) the proposal of the Southern

Traffic League, later conditionally accepted by the carriers, and (3) the proposal of the Tennessee commission. For convenience they are here restated in order, by classes :

	1	2	3	4	5	6	A	B	C	D
Carriers :	100	86	76	64	52	43	35	40	27	24
League :	100	85	70	55	45	40	30	35	25	22.5
Tennessee :	100	85	72	61	52	44	31	37	26	22

Proposals 2 and 3 contemplate the numbering of the classes from 1 to 10 and the reversal of the order of classes A and B, which would become, respectively, classes 8 and 7. The Tennessee commission's proposal makes each class 85 per cent of the next preceding class.

Freight classifications afford a means of grading rates according to the value of the service, although other factors, such as loading characteristics and liability to damage in transit, are taken into consideration. At the present time three principal classifications are in use, the official, Southern, and Western. We have endeavored to promote uniformity in classification, and much has been done in that direction, but in truth the purpose of uniformity in classification is not fully accomplished without uniformity in number of classes and also in class percentage relationships. There is still an absence of uniformity in results, when an article is rated class 6 in both official and Southern classifications, if that class is 28 per cent of first class in the one and 52 per cent of first class in the other.

At the present time there are six numbered classes in official classification, and eight classes in all if rules 25 and 26 be taken into consideration, the former representing a split between classes 2 and 3 and the latter a split between classes 3 and 4. In Western classification there are five numbered classes and five lettered, a total of 10. In Southern classification there are six numbered classes and four lettered, a total of 10, but the lettered classes now have a very limited application. Class A was originally designed to cover only cotton bagging and ties, although in recent years it has been used to a certain extent as an overflow class for certain carload items. Class B applies almost exclusively to cured packing-house products and related articles. Class C applies chiefly to flour, and class D to grain and grain products other than flour.

Uniformity in classification and in the general structure of class rates is an ideal quite beyond reach until this situation is corrected. To its correction the carriers may well direct their energies, for, as will later clearly appear in discussing the proposed interterritorial rates,

the present inconsistencies in classification inevitably breed trouble in the border districts. It is probable, also, that when the problem is studied, twelve classes or even a greater number will be found preferable to ten.

No mathematical formula can be applied with any degree of authority to the determination of class percentage relationships. The problem is to arrive at relationships which will bring class rates to maximum usefulness and discourage the publication of all manner of special commodity rates.

The relationships originally proposed by the carriers were mere averages of the widely varying percentages of existing interstate scales in southern territory. The sole underlying thought was that in this way uniformity might be attained without loss or gain in revenue. Even this thought was inaccurate, for the averages were not weighted, and many distance scales of little traffic importance were included.

The League's percentages, on the other hand, were devised, after careful study of all the factors in the problem, to meet certain definite ends. In the first place, it was felt that Southern relationships should be brought into closer conformity with those prevailing in official territory, in view of the great volume of class traffic between these territories. In the second place, it was felt that they should be designed to aid in the process of eliminating classification exceptions and less-than-carload commodity rates and to promote the wider use for carload traffic of what are now, speaking in terms of number of commodities, the little-used lettered classes. In the third place, it was felt that ultimate national uniformity in relationships should be kept in view and percentages fixed which could later be extended, with slight modifications, to fit a twelve-class scale.

These various ends are desirable, a fact conceded by the carriers when they agreed to accept the League's percentages. While the relationships proposed by the Tennessee commission are preferable to those originally proposed by the carriers, they seem on the whole less likely to achieve the desired results than those formulated by the League.

We find

8. That class percentage relationships should be uniform for all traffic, whether intraterritorial or interterritorial, which is governed by Southern classification, and that these uniform percentage relationships should be as follows:

Classes	1	2	3	4	5	6	7	8	9	10	11	12
Percentages	100	85	70	55	45	40	35	30	25	22.5	20	17.5

9. That the classes should be numbered from 1 to 12, inclusive, the present classes A, B, C, and D becoming, respectively, classes 8, 7, 9, and 10.

The relationships set forth in finding 9 are the same as those formulated by the League, with the exception that percentages have been added for classes 11 and 12. The latter do not now exist in Southern classification, but no harm can result from having these new classes and percentages ready for utilization. They may serve as a convenient substitute for certain commodity rates. . . .

[E]

Consolidated Southwestern Cases

Interstate Commerce Commission (1927), 123 I. C. C. 203, 234

. . . Between the southwestern gateways and Missouri River cities, on the one hand, and points in Kansas-Missouri territory and the Southwest, on the other, specific commodity rates are quite generally in effect via all-rail and ocean-rail routes on most articles in carloads which move in material volume. Comparatively few commodity rates apply on commodities in less-than-carload quantities to, from, or between points in the Southwest. Among the few articles on which such rates are generally applicable are cotton piece goods. To and from Kansas-Missouri territory a number of less-than-carload commodity rates on canned goods, beans, coffee, sirup, sugar, and a few other commodities apply. Texas is the only southwestern state in which many less-than-carload commodity rates still persist. Among the articles on which such rates lower than the class basis apply in that state are fertilizers, hides, leather, stock and poultry foods, unshelled peanuts, chocolate raw materials, eggs, iron and steel articles, junk, stoneware, earthenware and pottery, sulphur, ice, candy, cedar chests, and cotton-picking bags.

The carload commodity rates, speaking generally, differ widely as to levels in different parts of the Southwest, and should uniform commodity distance scales, or group rates based on uniform scales, be established throughout that territory on almost any basis, radical increases and reductions would of necessity result. While the rate and competitive situation on most commodities is in a general way similar to that on class rates, individual discussion of a number of important commodities dealt with of record follows.

In respect of the various commodities embraced in these proceedings the chaotic condition of the rates has resulted in many situations in which certain communities or sections enjoy rates relatively lower, and others are handicapped by rates relatively higher, than are warranted by comparable circumstances and conditions. Many of these advantages and disadvantages are undue. The commodities here dealt with are produced and distributed over a wide area. It has been pointed out that, except where marked differences in traffic density, population per square mile and per mile of railroad, and so forth, point to the propriety of different rate levels, the territory here considered is so homogeneous, both in respect of transportation and of marketing conditions, that a uniform scheme of rate-making, based largely upon distance and according to each community the advantage or disadvantage of its location, affords the only real remedy for the existing unlawful rate inequalities. It follows, also, that the prescription of such a basis will remove any undue prejudice and preference that exist, and for that reason it will not be necessary to discuss in detail the various instances disclosed. . . .

QUESTIONS

1. What is the difference between class rates and commodity rates?
2. Describe the methods by which the railroads determine the classification of a commodity.
3. List, in the order of their importance, the factors that should be considered in classifying freight.
4. Which of the factors considered in Question 3 will be most important in determining whether an article will move on class rates or on commodity rates?
5. It is claimed that articles moving in equal volume over the line of a carrier are entitled to a similar classification if their values per pound are similar. Decide.
6. How can the classification of an article be affected by the ratio between the total receipts from its carriage and the amount paid out to satisfy claims?
7. What justification is there for giving a lower classification to furniture which is shipped knocked down than to furniture set up?
8. How may the charging of high rates on articles of high value be reconciled with the principle of "cost of service"?
9. A shipper claims that because a commodity rate was higher than the charge which would have accrued under Class A rates (the highest class), the rate is unreasonable. Decide.

10. Does the justification for commodity rates depend entirely upon the volume of the commodity moved by the railroad?

11. What justification is there for commodity rates applicable to less-than-carload (l. c. l.) traffic?

12. On what grounds will a carrier decide to grant commodity rates on a specific article? What will the Commission consider if objection is made to such a rate?

13. What is the lowest limit at which a commodity rate may be set?

14. Is there any definite relationship that must exist between class rates and commodity rates within any single region? between the rates of the various classes?

15. Shippers contend that the establishment of commodity rates will give rise to a larger volume of traffic. Shall the Commission consider this contention in its determination of the rate to be charged?

16. Judging from the quotations from the Commission's decisions, what would be the relative class or commodity rating of iron scrap? of automobiles (assembled)? of dining-room tables? of live poultry? of dressed poultry? of butter and eggs? of strawberries?

b. WHAT THE TRAFFIC WILL BEAR

[A]

Lignite Coal from North Dakota to Stations in North Dakota, South Dakota, and Minnesota

Interstate Commerce Commission (1924), 89 I. C. C. 726

ESCH, *Commissioner* :

By schedules filed to become effective December 6, 1923, respondents proposed to increase the interstate rates on lignite from mines in North Dakota to destinations in North Dakota, South Dakota, and Minnesota. Upon protests filed by the governor and Board of Railroad Commissioners of the state of North Dakota, . . . the Board of Railroad Commissioners of the state of South Dakota, . . . and various producers and consumers of lignite, the operation of the proposed schedules was suspended until April 4, 1924, and voluntarily postponed by respondents to August 1, 1924. As similar increases were proposed by respondents in their intrastate rates within the state of North Dakota, those rates were suspended and a similar proceeding was instituted by the North Dakota commission. A joint hearing with that commission has been had, and the president thereof sat with us at

argument. Rates will be stated in amounts per ton of 2000 pounds, except as otherwise indicated.

Lignite constitutes nearly one third of the solid fuel resources of the United States. Approximately 90 per cent of it lies in the Northwest. The lignite area in North Dakota is estimated at 32,000 square miles. All of the North Dakota mines are located in the western half of that state. Lignite is also mined extensively in Texas, and in small quantities in a few other states. Prior to 1890 there was practically no production in North Dakota and Texas. Since 1918, when the present basis of freight rates was established, there has been a rapid increase in the volume of production in North Dakota. . . . In Texas the output has fallen off in the last few years because of the local production of fuel oil.

Lignite is a low-grade fuel. It may be considered as imperfectly developed coal which has a more or less woody structure. As mined it contains more than 30 per cent moisture, several times more than other coals. Exposure to the air causes lignite rapidly to lose part of its moisture, whereupon the lumps split and slack. Because of this, as a general proposition, it is not stored during the summer, but it is consumed promptly after transportation from the mine. Its heating capacity is approximately one half of that of bituminous coal. It is used by some industries. For instance, the Northern States Power Company, which operates steam electrical generating plants at various points in the Northwest, at its Minot, North Dakota, plant draws its fuel supply entirely from the North Dakota lignite fields. Of the 17 state institutions . . . of South Dakota, 11 use lignite in whole or in part. For domestic use lignite is more inconvenient to handle and to store, and makes more ash than other coal. It is slow in starting, and requires care to make it odorless.

Approximately 75.9 per cent of North Dakota lignite moves in box cars, 12.9 per cent in gondola cars, 0.3 per cent in stock cars, and 10.9 per cent in other cars such as bunk, sand, and ballast cars. From the docks both box and open-top equipment is used. While the general run of equipment is used by respondents for handling the lignite traffic, they concede that their box cars so used include so-called unfits so far as grain is concerned.

During the year ended March 31, 1923, 95.1 per cent of the lignite originating on the Northern Pacific moved east-bound and 4.9 per cent west-bound. That respondent points out that coal from the head of Lake Superior moves in the direction of the greater empty movement,

whereas the opposite is true of lignite. During the same year the Northern Pacific originated 490,216 tons of lignite in North Dakota. Of that . . . 88.2 per cent moved intrastate, 10 per cent moved interstate to stations in Minnesota, and 1.8 per cent moved interstate to South Dakota. From mines on the Chicago, Milwaukee & St. Paul a larger percentage of lignite moves to interstate destinations. This, no doubt, is due to the fact that some of those mines are not far from the South Dakota state line.

An analysis made by the Great Northern covering the year ended March 31, 1923, indicates that at 10 representative stations on that line in North Dakota 43 per cent of the coal received came from the head of Lake Superior, 2 per cent from Illinois, 4 per cent from other territory from which bituminous coal is shipped, and 50 per cent was North Dakota lignite; at 10 representative stations in South Dakota 68 per cent of the coal received came from the head of Lake Superior, 26 per cent from Illinois, 3 per cent from other states, and 3 per cent was North Dakota lignite; . . . and at 10 representative stations in northwestern Minnesota 70 per cent of the coal received came from the head of Lake Superior, 10 per cent from Illinois, and 20 per cent from North Dakota.

Respondents state that due to cold and snow operating conditions are most difficult during December, January, and February, when much of the lignite moves.

Approximately 83.5 per cent of the lignite tonnage is local traffic, and the remaining 16.5 per cent moves over two or more lines.

Of the 1923 lignite tonnage of the Northern Pacific 67.2 per cent . . . moved from branch-line points; and of its interstate tonnage 78.3 per cent moved from branch-line points. Coal moving from the head of Lake Superior originates at main-line points.

The average loading of bituminous coal handled by the Northern Pacific during 1923 was 43.4 tons, as compared with 38.4 . . . tons of lignite. . . . Protestants state that this difference is due to the fact that more smaller cars are furnished for the shipment of lignite than of bituminous coal.

Pursuant to legislative enactment of 1895 by the state of North Dakota, single-line intrastate lignite rates were made effective by the Northern Pacific July 1, 1897, and later by other carriers. In 1903 and again in 1907 by similar enactment intrastate rates were prescribed substantially lower than those enacted in 1895. In the belief that the 1907 legislative rates were confiscatory, the carriers refused to

publish them. In August, 1907, the attorney-general of North Dakota instituted proceedings in the state courts seeking to compel certain of the North Dakota carriers to publish the 1907 legislative rates. By decision of the Supreme Court of the United States, in March, 1910, *Northern Pacific Ry. v. North Dakota*, 216 U.S. 579, the carriers were required to establish the 1907 legislative rates, without prejudice to petition the court to reopen the case in order to make a showing of confiscation, if their experience with the rates convinced them that that was a fact. In compliance with that decision, the 1907 legislative rates were made effective April 11, 1910. Upon petition of the carriers filed in April, 1911, the court proceedings were reopened and testimony was introduced in support of their contention that the 1907 legislative rates were confiscatory. In March, 1915, the Supreme Court of the United States in *Nor. Pac. Ry. v. North Dakota*, 236 U.S. 585, held that those rates were confiscatory. Thereupon, effective June 5, 1915, the carriers voluntarily restored the 1895 legislative rates which had been in force prior to April 10, 1910. By order of August 16, 1915, the North Dakota commission prescribed a scale of intrastate lignite rates slightly in excess of those found confiscatory by the Supreme Court. A conference participated in by the North Dakota commission, the lignite shippers, and the North Dakota originating lines on September 4, 1915, resulted in the establishment, effective on that date, of a scale of intrastate rates somewhat higher than the confiscatory rates up to 300 miles and slightly lower than those rates for greater distances. These so-called conference rates were subjected to the specific increases prescribed in General Order No. 28 of the Director General of Railroads. During 1918, the United States Fuel Administration divided the country into zones for the purpose of effecting economy in the use of fuel and transportation facilities. This created fear in the minds of the people of North Dakota, South Dakota, and Minnesota, that they would be deprived of their usual source of fuel supply, and representations were made to the railroad administration for a lower scale of lignite rates. To meet this emergency the railroad administration prescribed such a scale of rates applicable from North Dakota to North Dakota, South Dakota, and Minnesota. It was made effective November 20, 1918. On intrastate traffic these so-called emergency rates continued in effect until May 21, 1921, when they were advanced 35 per cent under our order in *North Dakota Rates, Fares, and Charges*, 61 I. C. C. 504. On interstate traffic these emergency rates were increased effective August 26, 1920. The emer-

agency rates thus increased were reduced 10 per cent July 1, 1922, and are the rates in effect today on North Dakota intrastate and interstate traffic.

Prior to 1917 there were no specific lignite rates on interstate traffic from North Dakota except that the North Dakota intrastate scales were applied to border points in Minnesota or where destinations in North Dakota were reached by passing through portions of another state. On September 15, 1917, the Northern Pacific published interstate rates to stations on its line in Minnesota west of the Twin Cities. To Minnesota destinations 300 miles or more from the North Dakota mine the rates were established on the same level as the rates then in effect from the head of Lake Superior to Minnesota stations; and to destinations less than 300 miles from the shipping point the rates were graded down so as to make a consistent tariff. Those 1917 rates remained in effect until August 9, 1918, when a lower scale was published in the hope of meeting the condition heretofore described. The rates established August 9, 1918, continued in effect until November 20, 1918, when the so-called emergency rates were made effective.

The rates under suspension are those carried in the scale prescribed in *Holmes & Hallowell Co. v. G. N. Ry. Co.*, 60 I. C. C. 687 and 69 I. C. C. 11. . . .

As stated, the proposed scale is the Holmes & Hallowell scale. While rates from the Lake Superior docks . . . to points in Minnesota, North Dakota, and South Dakota east of the Missouri River are *based* on that scale, it is not strictly applied. Distances in connection with the application of that scale are computed from Duluth, a dock nearer to the destination territory than some of the other docks, by the shortest routes comprising not more than three lines, so that the rates over longer routes are lower than those shown in the scale for the actual distances traversed. *Lake Dock Coal Cases*, 89 I. C. C. 170, 174.

The Holmes & Hallowell scale applies in a territory in which the population and traffic density decrease as the distances from points of origin increase, and this was taken into consideration in its construction. *Lake Dock Coal Cases*, *supra*. Here the opposite is true; as distances from the mines increase the population and the traffic density increase.

The proposed increases in the single-line rates range from 24 cents to \$1.64, and in the joint-line rates from 5 cents to \$1.52. The percentage of increase in the single-line rates ranges from 39.4 to 63.5 or an average increase of 51.2 per cent; and in the joint-line rates from

5.2 to 52.7 per cent, or an average increase of 36.7 per cent. The present rates produce ton-mile earnings of from 24.4 mills, single line, and 29.25 mills, joint line, for 25 miles, to 4.65 and 4.85 mills, respectively, for 700 miles. The proposed rates would produce from 34 mills to 7.02 mills both single line and joint line for those respective distances.

According to protestants, the average haul of North Dakota lignite is 195.3 miles. For that distance the proposed rate constitutes an increase of 63.4 per cent over the present single-line rate and 28.8 per cent over the present joint-line rate.

During 1923 the Minot plant of the Northern States Power Company consumed 24,733 tons of lignite. The proposed rates would effect an increase of 61.5 per cent in the rates to that plant from its usual source of supply.

The Jamestown, North Dakota, Chamber of Commerce, protestant, shows that under the present single-line rates the spread between the two mines at Wilton and Medora is 61 cents, whereas under the proposed rates the spread would be \$1.01.

Using 1303 cars of lignite moving from the South Dakota state mine at Haynes, North Dakota, to 15 destinations in South Dakota, the railroad commission of that state shows that the average weight was 76,456 pounds, average haul 283.2 miles, average rate \$1.809, average earnings per car \$68.83, and per car-mile 24.3 cents. Under the proposed rates these average earnings would be \$104.21 per car, and 36.7 cents per car-mile, and the average rate would be \$2.74.

Respondents take the position that the present rates are confiscatory because they are lower than the rates held confiscatory by the Supreme Court when subjected to the various general rate changes made subsequent to their establishment, and because their earnings, . . . expenses, and operating ratio present a worse showing now than they did before the Supreme Court.

They refer to the refusal in 1921 of the Board of Railroad Commissioners of Montana to apply intrastate within Montana the rates then applicable from North Dakota mines or to prescribe lower rates on lignite than on screened bituminous coal. In that decision the Montana commission prescribed 80 per cent of the rates on lump as reasonable on lignite slack or screenings. The present lignite rates from North Dakota, and the Holmes & Hallowell scale apply the same rates on lump as on slack coal. There is a fine-coal rate from the head of Lake Superior established to meet competition from southern

Illinois. Of the lignite shipped from North Dakota mines approximately 74 per cent is lump, 10 per cent mine run, and 16 per cent screenings.

Respondents submit the following comparison of the 1895 legislative rates, the confiscatory rates, and the conference rates subjected to the various general increases and reductions, with the present and the suspended rates :

DISTANCE	LEGISLA- TIVE RATES, 1895	CONFIS- CATORY RATES (LEGISLA- TIVE RATES, 1907)	CONFER- ENCE RATES	PRESENT RATES		RATES UNDER SUSPEN- SION
	Single Line	Single Line	Single Line	Single Line	Joint Line	Single Line and Joint Line
	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
5 miles . . .	73	73	97	61	73	85
10 miles . . .	97	73	97	61	73	85
25 miles . . .	109	85	97	61	73	85
50 miles . . .	134	97	122	73	97	102
75 miles . . .	158	109	134	85	109	128
100 miles . . .	170	122	146	97	122	145
125 miles . . .	182	122	158	109	122	168
150 miles . . .	194	134	170	122	134	182
175 miles . . .	207	158	170	134	158	204
200 miles . . .	219	170	182	134	170	219
225 miles . . .	231	182	182	158	182	241
250 miles . . .	243	182	194	170	182	255
300 miles . . .	267	194	207	182	207	286
350 miles . . .	292	219	219	207	219	316
400 miles . . .	304	231	231	219	231	346
450 miles . . .	—	—	—	243	255	371
500 miles . . .	—	—	—	267	279	395
550 miles . . .	—	—	—	292	304	419
600 miles . . .	—	—	—	316	328	443

It will be observed that the present single-line rates are lower than, and the present joint-line rates are substantially the same as, the confiscatory rates subjected to the various general rate changes.

Respondents rely almost entirely upon the history of the rates on lignite to establish their contention that the existing scale is unreasonably low; and to establish the lawfulness of the proposed rates they rely upon the Holmes & Hallowell scale as a standard of reasonable coal rates in this territory fixed by us.

They introduced rate comparisons purporting to show that the present rates on lignite are lower than the intrastate rates on

bituminous coal within Minnesota, South Dakota, North Dakota, Wisconsin, . . . Montana, . . . Wyoming, . . . Colorado, . . . Iowa, . . . and Washington, . . . as well as the interstate rates on lignite from North Dakota to Montana, and on bituminous coal from points in Illinois, Pennsylvania, Montana, Wyoming, and Colorado to various destinations. They also show that the present lignite rates are lower than the interstate scales of rates on low-grade commodities such as brick, . . . stone, . . . cinders, clay, drain tile, sand, . . . and gravel, crushed stone, sawdust and shavings, fuel wood, and ice. Protestants point out and respondents concede, that the volume of movements . . . of many of those commodities under the compared rates is not substantial. Protestants also refer to the fact that some of those commodities are manufactured, and are of greater value, load lighter, and move shorter distances than lignite. Some of these comparisons are discussed in our recent decision in *Lake Dock Coal Cases*, *supra*. . .

For the state of South Dakota it is shown that from Haynes, North Dakota, at which point the state of South Dakota owns a mine from which most of its lignite is obtained, to the 11 institutions using lignite the present rates range from \$1.46 to \$3.16, for distances ranging from 213 to 560 miles; and that the average increase under the proposed rates would be \$1.10 per ton. Such an increase is alleged to be sufficient to cause at least half of those institutions to discontinue the use of lignite because it would wipe out the cost advantages gained by the use of lignite. They also state that elimination of the use of lignite by municipal plants, industrial plants, and for domestic purposes will also result from increased rates.

Because lignite is such a low-grade commodity and is so distinct from ordinary coal, protestants consider it entitled to a substantially different classification and basis of rates. In this connection they refer to the ability of Eastern coals to move long distances to compete with lignite. They also refer to the fact that coal rates from many producing points throughout the United States are lower on steam sizes than on lump, whereas the rates on lignite apply on all sizes. In the *Holmes & Hallowell* case we recognized a difference in the rates on anthracite and on bituminous.

The South Dakota commission introduced evidence purporting to show that the value of the railroads serving that state and the state of North Dakota is considerably greater per mile of line outside of those states than within those states. Somewhat similar showing was made concerning grades, curves, and maintenance expenses.

The Minnesota Railroad and Warehouse Commission expressed the view that full consideration be given to the economic features involved, such as the status of the commodity as a fuel, the industry, and the limited purchasing power of the consumer who uses lignite.

The Chamber of Commerce of Watertown, South Dakota, protestant, objects to the proposed rates because of the prospective effect they will have upon the continued availability of lignite as a source of supply of fuel at prices which will make its use possible. Witness for this protestant states that lignite is not a desirable fuel either for power or for domestic uses and that during normal times lignite does not seriously compete with other coals at Watertown. It desires the maintenance of the present basis of rates in order that lignite will be a source of supply during emergencies such as occur during strikes of the miners or railroad employees; and because with the supply available it acts as a governor in the fixing of the prices of other fuels. In normal years lignite constitutes about 3 per cent of the total volume of coal consumed in Watertown, both power and domestic.

The Northwestern Coal Dock Operators Association takes the position that the rates on lignite, with which its coal competes, should not be lower than the level of rates on bituminous coal from the head of Lake Superior. They are opposed to any differences in rates because of differences in quality of the same commodity. They refer to a statement made in a report of the United States Geological Survey to the effect that anthracite does not command a higher price than bituminous coal because of greater heat value, the B. T. U. value of anthracite being lower than that of certain bituminous coals, but because of its suitability for domestic use and because of its freedom from smoke, soot, and waste.

While some of the coal produced in the Kirby, Wyoming, field moves into territory served with lignite, the rates and prices applicable to that coal are so much higher than those on lignite that the producers in that field do not consider the competition between the two coals very strong.

We find that respondents have not justified the schedules under suspension and an order will be entered requiring their cancellation. We further find that the present rates are too low. The record is insufficient to determine specifically proper rates for the future. The examiner who heard the case has suggested to us the scale of rates set forth in Appendix 2 hereof. Without expressing our opinion as to that scale we submit it to the parties for the purpose of securing their views

as to that scale. The parties may deem it more desirable to confer among themselves to determine proper rates for the future — rates perhaps different from those suggested by the examiner. We will expect the parties to determine which of the two courses outlined they will pursue and to bring to our attention the conclusions they reach.

[B]

[In considering the subject discussed in this section particular attention should be directed toward the last paragraph of the Hoch-Smith Resolution (I. C. Act, pp. 86-87).]

[C]

California Growers' & Shippers' Protective League v. Southern Pacific Company

Interstate Commerce Commission (1927), 129 I. C. C. 25, 32

... In complainant's view the existing depression in the California deciduous-fruit industry is precisely such as the Hoch-Smith resolution was designed to assist. It contends that a rate reduction will tend to foster and preserve that industry and that this result will be in the interest of a natural and proper development of the country as a whole. Defendants, on the other hand, claim that if they have justified their present rates under Sections 1 and 3 of the Interstate Commerce Act nothing either in the Hoch-Smith resolution, or developed of record in the instant case, will provide lawful warrant for us to reduce such rates.

In two recent cases we have had occasion to discuss the meaning and intent of the Hoch-Smith resolution. In *Grain and Grain Products*, 122 I. C. C. 235, 264, we said :

As aforesaid, the intent of the resolution is that products of agriculture affected by depression shall move at the "lowest possible lawful rates compatible with the maintenance of adequate transportation service." It sets no new standard of lawfulness, but provides, in effect, that to the extent that there are flexible limits to our discretion, we shall require the maintenance of the lowest rates falling within those flexible limits. Rates that may lawfully be required must in principle be high enough to cover all of the cost that may fairly be allocated to the service plus at least some margin of profit. *Northern Pacific Ry. v. North Dakota*, 236 U. S. 585; *Norfolk & Western Ry. v. West Virginia*, 236 U. S. 605. But it has always been recognized that the burden of transportation may reasonably be adjusted with some regard to

the value of the service, in other words, that the higher grade, more valuable commodities may be required to pay a greater margin of profit than those that are of lower grade and less valuable. The substance of the provision of the resolution quoted above is that agricultural products affected by depression shall in this respect be included in the class of most favored commodities, to such extent, at least, as may be "compatible with the maintenance of adequate transportation service."

Subsequently, in connection with similar language in *American National Live Stock Asso. v. A., T. & S. F. Ry. Co.*, 122 I. C. C. 609, 617, we further said:

In the past we have had occasion to consider at times what may be called "out-of-pocket" cost, but while it has been contended that the carriers might voluntarily, in certain situations, establish rates covering only such cost, it has never been seriously contended that we could lawfully require this to be done. Rates that we may lawfully require must in principle be high enough to cover all the cost that may be fairly allocated to the service plus at least some margin of profit. . . . We say "in principle" because only rarely is definite information available as to such cost, and in practice rates must often be fixed largely by comparison with other rates. Of course, the other sections of the Interstate Commerce Act must also be borne in mind in determining the lowest lawful rates in a particular situation.

The resolution is in effect a direction to us to give agricultural commodities affected by depression the lowest rates that it is possible to give without running counter to the provisions of the Interstate Commerce Act and the carriers' rights under the Constitution. Section 1 of the act requires that all rates shall be just and reasonable. What is a reasonable rate? It may be said to be somewhere between the minimum charge that can be made for the service and permit the carrier to live, and the maximum charge that can be borne by the shipper. In the *Western Rate Advance Case*, 20 I. C. C. 307, pp. 347, 348, we said:

What is the reasonable rate that shall be charged to the shipper? The legislature may not make rates so as to confiscate the carrier's property. The carrier, on the other hand, may not make rates which are unjust to those who by economic necessity are compelled to employ its services. Here, then, we have the minimum of legislative power and the maximum of the carrier's power. Between these lies a zone, indefinite and variable. Without question the carrier will tend toward the maximum, while governmental authority will be inclined — in fact has been created — to repress its upward tendency. One moves inevitably upward to the highest rate which the traffic will bear; the other attempts to discover some relation between charge for service and cost of service.

Both the Commission and the courts have repeatedly referred to a flexible limit of judgment in reaching a conclusion as to the reasonableness of a rate or a schedule of rates. Otherwise stated, there is a zone of reasonableness within which any rate is just and reasonable to the carrier as well as just, fair, and reasonable to the shipper that utilizes the carrier's services.

We again conclude that "the lowest possible lawful rates" which we may prescribe under the resolution on any given agricultural traffic as to which depression has been shown must be somewhere within the zone of reasonableness permitted by the flexible limits of discretion reposed in us and that such rates must be put as near the lowest limit or level of that zone as is compatible with the maintenance of adequate transportation service. . . .

QUESTIONS

1. What is the meaning of "what the traffic will bear"?

2. A group of carriers announce that the rates on certain valuable commodities will at some later date be increased 500 per cent. The Commission suspends the increase. At the hearing on the subject the carriers admit that no item in the cost of transportation, including the risk of loss, justifies the increase. Their claim is that the very high prices at which the commodities are sold make the item of freight, even at the increased rate, of no significance, and for that reason the increase should be permitted. Decide.

3. "The effect of giving lower rates on lignite than on bituminous coal is to subsidize the owners of lignite mines at the expense of shippers in general." If this is true, is it a desirable situation? Is it true? Might the owners of lignite mines be subsidized at the expense of other groups? To what extent would such subsidizing seem proper?

4. Are there any groups of business men who are being helped to exist by subsidies paid (1) by governmental bodies or (2) by consumers in general? Is a subsidy on this basis better than one which might be granted by the process of giving exceedingly low railroad rates?

5. Is the direction given by Congress in the last paragraph of the Hoch-Smith resolution good economics?

6. What was Congress's purpose in approving that portion of the resolution?

7. Has the Commission exercised its powers wisely in its application of the last portion of the resolution to problems relating to agricultural rates?

8. To what extent can an industry be helped by special consideration in rate-making?

9. How are "what the traffic will bear" and commodity rates related?

10. Granite valued at \$2.25 per hundred pounds and less can be shipped at a lower rate than granite valued at above \$2.25. Is this an unfair discrimination against the higher-valued product?

11. A manufacturer of brick in Athens, New York, presents evidence to the Commission showing that because of the freight rates on brick he cannot compete with other manufacturers of this commodity at points in the Middle West and beyond. To what extent would it be economically wise to lower the rates to permit such competition?

12. "To the extent that there are flexible limits to our discretion, we [the Commission] shall require the maintenance of the lowest rates falling within those flexible limits." Relate this statement to "what the traffic will bear."

13. Can you suggest any general limits to adjustments of rates that might be made on the principle of "what the traffic will bear"?

3. COMPETITION

a. CARRIER COMPETITION

Drayage Absorptions by the Southwest Missouri Railroad Company

Interstate Commerce Commission (1926), 113 I. C. C. 179

ESCH, *Commissioner*:

Exceptions were filed by respondent, Southwest Missouri Railroad, to the report proposed by the examiner, and the parties were heard in oral argument.

This investigation was instituted upon our own motion on April 6, 1925, into and concerning the lawfulness and propriety of the Southwest Missouri Railroad tariff, I. C. C. No. 12, providing for certain absorptions on account of the drayage of ore, in carloads, from mines and switches enumerated in said tariff to the company's terminals and loading tracks at Picher and other points in Oklahoma.

The Southwest Missouri is an electric line owning no freight cars. It was engaged primarily in passenger business up to 1924 and operates transportation systems in Joplin and Galena, Missouri. Its main line extends from Carthage, Missouri, through southeastern Kansas to Picher, a distance of approximately 40 miles. Picher is located in the heart of a zinc and lead mining district which comprises an area extending about 8 miles east and west and 4 miles north and south along the Kansas-Oklahoma state line. This district is not served directly by any trunk line but is served by the Northeast

Oklahoma Railroad and the Miami Mineral Belt Railroad, as well as by the Southwest Missouri. The lines of the first two named carriers form a complete network covering the entire mining area. With short main lines to trunk-line connections they have approximately 90 miles of rail, including over 150 loading tracks and switches where they receive ore for transportation after it has been drayed from the mine bins by or for the shipper. The average distance from all of the mines in this district to a loading track of either the Northeast Oklahoma or the Miami Mineral Belt is less than 0.25 mile. There are only eight or ten mines in this district that with respect to drayage distance are as favorably located to the tracks and sidings of the Southwest Missouri as to the tracks and sidings of the Northeast Oklahoma or the Miami Mineral Belt. The Miami Mineral Belt is a steam road having about 65 box cars. The Northeast Oklahoma is electrically operated but supplements its service with steam motive power. It owns approximately 150 freight cars. Both roads are primarily dependent for their revenues upon the outbound movement of ore. The Miami Mineral Belt formerly operated passenger trains in connection with the St. Louis-San Francisco between Picher and Joplin, but was forced to withdraw from this service by the more frequent service of the Southwest Missouri.

With the advent of improved automobile roads the Southwest Missouri was faced with a rapid decline in passenger traffic and a deficit in operation. Its only alternative seemed to be to seek freight traffic. It first sought permission from the Oklahoma Corporation Commission to build crossings over the other lines so as to extend its lines farther into the zinc field, but the Oklahoma commission refused such permission on the ground that the territory was already adequately served by the Northeast Oklahoma and the Miami Mineral Belt.

With a view to attracting to its rails ore traffic from certain mines in this district which would normally move over the rails of the Northeast Oklahoma or Miami Mineral Belt because of the shorter drayage required to the loading tracks of one or the other of those roads, the Southwest Missouri then filed with us the tariff here under consideration. It describes four zones one-half mile in width and provides that on ore, in carloads, drayed to specified loading tracks from mines in zone 1, not over one-fourth mile from such loading tracks, no drayage absorption will be paid; that from mines in zone 2, within one-half mile beyond zone 1, a drayage absorption of 15 cents per net ton will be paid; that from mines in zone 3, within one-half mile beyond zone 2,

a drayage absorption of 30 cents per net ton will be paid; and that from mines in zone 4, within one-half mile beyond zone 3, a drayage absorption of 45 cents per net ton will be paid. The tariff also contains a list of mines with their zone location and the amount of absorption on ore originating at each mine. The maximum absorption is 45 cents per net ton in connection with drayage hauls from mines not in excess of 1.75 miles from the designated loading tracks, and no provision is made for making any absorption on account of drayage from other mines in the district more than 1.75 miles from the designated loading tracks of the Southwest Missouri. No absorption is made on ore from zone 1 mines, for the reason that those mines are regarded as tributary to the Southwest Missouri, and no absorption is made from mines beyond zone 4, for the reason that the ore buyer, who is the shipper, is not willing to pay directly the greater charge demanded by the teamsters for the longer haul involved from those mines, and the Southwest Missouri does not feel warranted in shrinking the revenues received for its rail transportation to any greater extent than 45 cents. Since the operation of the tariff the tonnage of the Southwest Missouri has amounted to 654 carloads in six months, while prior to the filing of the tariff there was practically no freight traffic. Excluding any charge, except as to one electric locomotive, for interest on investment, maintenance, or depreciation of equipment, respondent shows that its operations in the aggregate have earned a net return, although, because of the absorptions, it has received for similar rail hauls substantially two thirds less revenue on some shipments than on others of equal weights, and some of the rail hauls have been conducted at an actual loss.

Under the custom in the zinc field, none of the ore is loaded directly from the mine bins into the cars, but all is drayed from the mine bins and loaded into the cars by the ore buyers or shippers either by their own teams or by independent teamsters under contract. In all instances a so-called turn-around charge of 50 cents per net ton, based on the distance to the nearest loading track, is paid by the buyer to the teamster. This charge is paid even though the haul is very short, as it is in some instances. For hauls longer than the customary short haul, which appears to be one fourth of a mile or less, additional drayage charges are measured by the distance, grade, and physical difficulties encountered and, on ore to be shipped over the Northeast Oklahoma or the Miami Mineral Belt, are also paid by the ore buyer. The operation of the absorption arrangement is to pay to the teamster making

the haul to the Southwest Missouri tracks the amount specified in the tariff, thereby generally relieving the shipper of the necessity of making any payment to the teamster in addition to the turn-around charge, should the shipper desire to ship over the Southwest Missouri, and at the same time according the shipper for the rail transportation a rate as low as that available over other lines. The amount received from the carrier does not represent the teamster's total charge for the haul from the mines, but he receives in addition the 50-cent turn-around charge from the shipper.

The reasonableness of the rail rates is not in issue, nor is there any evidence that the amounts of absorption represent excessive amounts for that portion of the drayage which they are intended to cover.

No material disagreement exists in the statements of fact, and the questions to be decided are principally in regard to the application of the law to the facts.

The manner of posting the tariff in Oklahoma prior to its effective date was criticized by the other lines. There being no agency station in Oklahoma, publication was made at Webb City, Missouri, and the tariff was filed with the Oklahoma Corporation Commission and with this commission, which was sufficient so far as the method of posting and filing is concerned. There are errors in the amount of absorptions from some of the mines and also some mines within the zone boundaries are not listed in the tariff. Respondent has admitted these errors and is willing to correct any and all such errors which may be pointed out.

The tariff provides no policing rules intended to insure that the allowances paid are correct. However, respondent appears to have in force an arrangement under which forms provided by it are filled out and signed by the teamster hauling the ore from the mine in the particular zone. Under this arrangement respondent's representative at the loading track is supposed to satisfy himself that the ore was drayed from the point claimed by the teamster. Many mistakes are shown to have been made, and although most of these apparently are due to unfamiliarity with the tariff, nevertheless it is likely that mistakes will continue to occur in future, to say nothing of the possibility of misrepresentation. We have repeatedly criticized policing arrangements which are dependent upon the agent's knowledge or information received through investigation, and have consistently held that tariffs authorizing transit services and arrangements similar to those embraced in this proceeding which do not contain clear and definite

policing provisions to insure collection of the correct charges are in violation of Section 6.

Respondent attacks our jurisdiction, in the absence of discrimination, which it contends is not present, either to require or forbid the services under consideration, referring to the fact that it is a street, suburban, and interurban electric railway, which is not operated as a part of any steam-railroad system of transportation, and that the services referred to in the absorption tariff are merely a substitute for spur-track or team-track services and are performed by independent teamsters. Paragraph (22) of Section 1 of the act provides that the authority conferred by paragraphs (18) to (21) of that section

shall not extend to the construction or abandonment of spur, industrial, team, switching, or side tracks, located or to be located wholly within one state, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

Respondent argues that we should not undertake to accomplish by indirection that which we may not directly do, that we cannot challenge the carrier's right to construct spur tracks or team tracks, and therefore its right to provide a substitute service or to employ at lesser expense an agent to perform that service is equally clear. In view of the conclusions reached, it will be unnecessary to discuss the points mentioned.

Respondent contends that in the absence of a violation of the statute we are without power to substitute our judgment for that of respondent with respect to its operating policies. It urges that the absorptions for the drayage services are available to any teamsters who care to perform the service, that there is no discrimination between them, and that in the absence of discrimination we have no authority to require that these services shall be supplied or that they shall be withdrawn, citing Tariffs Embracing Motor-Truck or Wagon Transfer Service, 91 I. C. C. 539, 547, in which we said: "There is nothing in the act to prevent the establishment of such service or the publication of charges in connection therewith by carriers subject to the act."

The above quotation referred to accessorial terminal services by carriers subject to our jurisdiction in the collection and delivery of freight commonly referred to as store-door delivery, which services the carriers undertake to perform as a part of the transportation subject to our jurisdiction.

Cases are cited to show the prevalence of absorption practices throughout the country and the approval of the absorption of published charges of carriers subject to our jurisdiction for switching, gathering, and delivery services. Reference is made to the practice of carriers of employing independent private agencies to perform gathering or terminal services which the carriers hold themselves out to render as a part of the transportation subject to our jurisdiction. Under this head would come tap lines scattered throughout the lumber-producing sections, industries which receive allowances under Section 15 of the act, lighterage services in New York Harbor, elevator service at grain markets, and services in connection with the compression of cotton. Respondent maintains that these are a parallel to drayage absorption and that drayage absorption cannot be condemned without branding as unlawful the similar practices referred to through the country. Our findings herein are not to be understood as a condemnation of such practices nor even of drayage absorptions in all cases, but are based upon the peculiar circumstances of this case.

The Miami Mineral Belt and the Northeast Oklahoma railroads object to allowances being made solely for the purpose of inducing tonnage located adjacent to their rails to move over the rails of the Southwest Missouri Railroad. They contend that the consideration paid in the form of drayage absorption is solely upon the condition that the tonnage move over the rails of the Southwest Missouri Railroad, and that an allowance to a shipper either directly or indirectly as an inducement to ship over a certain line, however honest and justifiable on commercial principles, is contrary to the Interstate Commerce Act. They cite *Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, as holding that under Section 2 of the act payment cannot be made for a service not obligatory on the part of the carrier as a necessary part of the carriage or transportation service. They also cite *Wight v. United States*, 167 U. S. 512, in support of the view that the carriers have no right to make allowances to shippers for any service which the carriers would not be bound to perform. They quote from *Allowances for Transfer of Sugar*, 14 I. C. C. 619, 627, as follows:

The delivery of goods to a carrier and the receipt of goods from a carrier are duties devolving upon the shipper, for which the carriers cannot be compelled to pay. For carriers to undertake to make to shippers allowances based upon the performance by the shippers for themselves of services which they are legally bound to do for themselves is for the carriers to violate the Act to Regulate Commerce.

While as a matter of form the amounts of the tariff absorptions are paid to the teamster, the teamster is in fact the agent of the shipper and not of the carrier. The railroad to which the ore is to be drayed is designated by the shipper and the teamster hauls the ore to that railroad as directed by the shipper. The Southwest Missouri pays to the teamster a part of the drayage charges which the shipper would otherwise have to pay if he desired to ship by that line. While the Southwest Missouri volunteers to make this payment, it does not by the absorption tariff hold itself out to perform any part of the drayage service from the mine bins to its loading tracks, and in fact it expressly disclaims that it has possession of the ore or any control over it until the drayage service has been completed and the ore has been placed in the course of rail transportation by delivery to the carrier at its loading tracks, as shown by the following quotation from its brief :

In the present case the interstate character of the commerce does not attach until it is delivered to the carrier for transportation. The carrier does not provide any service from point of origin to its loading tracks. The property is in possession and control of the ore buyer until that time. It is not in the possession of the carrier, nor has the carrier any control over the property, until it is started in the course of interstate transportation. It is perfectly clear, therefore, that the Commission is without jurisdiction over either the teamster or the service which he performs.

When closely analyzed, the tariff under consideration in its present form is nothing more or less than a statement that out of its published tariff rate for rail transportation subject to our jurisdiction the Southwest Missouri will make to shippers at certain mines, either directly or through the medium of payments to teamsters employed by and under the direction and control of those shippers, specified rebates varying in amount in inverse ratio with the accessibility of such mines to that carrier's rails, but that shippers at other mines, including those nearer to as well as farther distant from its rails, will be required to pay the full published tariff rate if they tender to the Southwest Missouri at the same loading tracks like traffic for like transportation subject to the Interstate Commerce Act. Such a practice is clearly unjustly discriminatory in violation of Section 2 of the act, which provides that no common carrier subject to the act shall, directly or indirectly, by any special rate, rebate, or other device, charge or receive from any person a greater or less compensation for any service rendered in the transportation of property subject to the act than it charges or receives from any other person for doing for

him a like and contemporaneous service in the transportation of a like kind of property under substantially similar circumstances and conditions.

The reason for not absorbing any of the drayage charges from mines in zone 1, while making absorptions from mines in the other zones, is the competition with the other railroads, which requires the absorptions from zones 2 to 4 inclusive, but does not require any absorption from zone 1. Competition between carriers does not constitute such a dissimilarity of circumstances and conditions as will excuse what would otherwise be an unjust discrimination under Section 2. *Wight v. United States*, *supra*; *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57.

We find that the tariff described in this report provides for the application of more than one rate, and for unjustly discriminatory rates, to the transportation of a particular class of traffic from one point of origin to certain points of destination, in violation of Sections 2 and 6 of the Interstate Commerce Act. An order requiring cancellation of the tariff will therefore be entered, and the proceeding discontinued.

[Commissioner McMANAMY wrote a dissenting opinion, and Commissioner CAMPBELL also dissented.]

QUESTIONS

1. How does competition between rail carriers differ from the competition between independent manufacturers of a prepared breakfast food? between builders of steel bridges? between growers of wheat?

2. Describe the competition of railroads for passengers between large centers, such as New York and Chicago or Chicago and the Twin Cities.

3. A carrier establishes a motor-coach line by which it transports its passengers without extra charge from its terminal in Jersey City, New Jersey, to certain hotels and other points in New York City. Another carrier, having a terminal in New York City, contends that the bus service amounts to a reduction in passenger fares below the limit set by the Commission. Should the bus service be permitted without extra charge?

4. A railroad pays an independent company fifty cents for every meal served to the road's passengers, who are charged a relatively low price for the meals. Is this a legitimate form of competition between carriers?

5. The Southwestern Missouri proposes to absorb thirty cents per ton of the draying charge from any mine in the territory described in the principal case. Will the Commission approve this absorption?

6. A carrier defines competitive traffic as follows: "Competitive traffic is traffic which, at the time of shipment, may be handled at equal rates (exclusive of switching charge) from the same point of origin to same destination via other carriers, one of which performs switching service." The carrier absorbs switching charges for traffic which is covered by this definition. It is contended that the charge must be absorbed even if the traffic could not be handled at equal rates by other carriers. Decide.

7. The Erie Railroad uses a trucking service to deliver freight in New York. It maintains three stations in Manhattan, and will deliver freight to them at the regular tariff rates or will deliver it to the store door of the consignee for an additional payment of trucking charges from the Manhattan side of the Hudson River to the store door. It is urged that the railroad is supplying an extra service to its shippers for which additional compensation should be received. Decide.

8. What advantages, if any, has a shipping point that is served by two or more carriers over a point that is served by only one?

9. "If free and complete carrier competition were permitted, there would be no need for a regulatory agency for the railroads." Comment on this statement.

10. List the forms of competition between railroads that are legitimate from the economic point of view; from the legal point of view. Should there be any difference between the two lists?

b. MARKET COMPETITION

Galveston Commercial Association *v.* Galveston, Harrisburg & San Antonio Railway Company

Interstate Commerce Commission (1927), 128 I. C. C. 349

CAMPBELL, *Commissioner* :

. . . In the original report in the title case, 100 I. C. C. 110, division 2 found that the relationships between the rates on certain commodities in export, import, and coastwise movement from or to points in Oklahoma, Arkansas, Louisiana on and south of the line of the Gulf, Colorado & Santa Fe extending from Bon Weir, Texas, to Oakdale, Louisiana, referred to as southwestern Louisiana, Kansas south of the main line of the Union Pacific from Kansas City to the western boundary of the state, referred to as southern Kansas, and Texas, to or from Galveston, Texas, were unduly prejudicial to Galveston and unduly preferential of New Orleans, Louisiana. The division further found that the undue prejudice should be removed by establishing, on the

commodities named in the report, the same rates to or from New Orleans or Galveston, as the case might be, where the differences in distance from or to the two ports are not greater than 100 miles, and by establishing rates to or from Galveston, as the case might be, certain minimum differentials under New Orleans where the differences in distance in favor of Galveston are greater than 100 miles. These findings did not apply to the rates on rosin from Texas points and on green coffee to points other than in Texas, which were found not to be unduly prejudicial. The record was found to be too incomplete to warrant prescribing relationships between the rates to or from Galveston and New Orleans on commodities, or from or to points, other than those embraced in the findings, but defendants were admonished to use the relationships prescribed as a guide in readjusting the rates on other export, import, and coastwise traffic wherever undue prejudice such as was contained in that report exists.

Upon petitions therefor from numerous interests, the case was reopened for further hearing, but the original order was permitted to become effective as of December 10, 1925. The schedules filed in purported compliance with the order contained a number of apparent departures from its provisions, and upon protests against the proposed schedules from numerous interests throughout the Southwest and elsewhere, their operation was suspended and the suspension proceeding, No. 2560, set for joint hearing with the further hearing in the title case. The effective date of the suspended schedules in No. 2560 has been voluntarily postponed by respondents until August 20, 1927. . . . All of these cases will be disposed of in one report. Rates and differences in rates will be stated in amounts per 100 pounds, and will be understood to apply on export, import, or coastwise traffic, unless otherwise indicated.

The original complaint in the title case brought in issue the reasonableness and prejudicial character of the export, import, and coastwise rates on all commodities between all points in western classification territory and Illinois, on the one hand, and Galveston on the other, particularly in respect of their relationship to the rates between the same interior points and New Orleans and Mobile, Alabama. At the hearing the issue of unreasonableness was withdrawn. Other Texas ports intervened and asked for the same relief that might be accorded to Galveston in its relationship with New Orleans and Mobile. As restricted by the evidence at the original and further hearings the principal issue in the title case is one of prejudice against

the Texas ports and preference of the Louisiana ports on some fourteen commodities or commodity descriptions specifically named in the original findings, moving export, import, or coastwise through the Gulf ports referred to, from or to interior points in southern Kansas, Oklahoma, Texas, Arkansas, and Louisiana.

The Texas ports, with unimportant exceptions, have long enjoyed the same rates from and to points in Texas on and north of the line of the Texas & Pacific, referred to as northern Texas, Oklahoma, and southern Kansas, hereinafter referred to as the affected territory, on foreign and coastwise traffic moving in substantial volume through two or more of those ports. This is also true of the Louisiana ports. The difference in distance to any two of the Texas ports or to any two of the Louisiana ports is in no instance greater than 100 miles. The present equalization as between the Texas ports or as between the Louisiana ports is not here in issue, and in considering the relative conditions at these ports the two sets of ports will be considered together, so far as possible, unless otherwise indicated. The fact must not be lost sight of, however, that Galveston is the principal complainant and New Orleans the principal protesting intervener, so that the relative conditions affecting these two ports with respect to the traffic herein concerned merit particular attention. . . .

With some exceptions, the rates between points in northern Texas, Oklahoma, Kansas, and states north and west thereof, on the one hand, and New Orleans on the other, are equalized with those to or from Galveston and the other Texas ports. This is also true on a number of commodities from or to points in Texas south of the Texas & Pacific. . . .

Voluminous exhibits purport to show the differences in average hauls to Galveston and New Orleans, and to Texas ports on the one hand and Louisiana ports on the other, with respect to the important commodities moving from or to points in the affected territory. It is unnecessary to recite here the details of these exhibits or the formulas used by the various witnesses in computing them. In the original report division 2 required the carriers, in determining distances as a basis for applying the differentials prescribed, to use the shortest routes via existing connections for the interchange of carload traffic, embracing as a maximum the lines or parts of lines of not more than three line-haul carriers, lines under common ownership or control to be considered as a single line. Some objection to this formula was raised, primarily because it failed to recognize existing through routes

for the transportation of the respective commodities considered embracing more than three line-haul carriers and over which the distances are less than if computed under the prescribed formula. The formula is important in determining whether a point is in equalized or differential territory; that is, whether it is 100 miles or less, or more than 100 miles, farther from New Orleans than from Galveston, and in determining differences in distance to each port or set of ports it is important that the same formula or rule be used. The exhibits demonstrate that the variation in the differences in average distance to the ports under the respective formulas used is small.

The pertinent exhibits have been analyzed and the average differences in distance from representative interior points, as nearly as they can be determined upon this record, are as follows:

From southern Kansas to New Orleans 898 miles, to Galveston 755 miles, difference 143 miles; excluding points in equalized territory, 930 and 768 miles, respectively, difference 162 miles.

From Oklahoma to New Orleans 691 miles, to Galveston 545 miles, difference 146 miles; excluding points in equalized territory, 720 and 546 miles, respectively, difference 174 miles.

From northern Texas to New Orleans 644 miles, to Galveston 444 miles, difference 200 miles; excluding points in equalized territory, 670 and 457 miles, difference 213 miles. . . .

Complainant contends that Galveston is entitled to the benefits of its geographical location, and that its prosperity as a port depends upon its ability to secure and retain rail rates which will reflect the advantages of its location as compared with that of New Orleans. For many years, if not since its establishment as a port, the traffic moving through Galveston, excluding Mexican crude petroleum which moves largely in private tankers, has consisted largely of export traffic, of which cotton, cottonseed products, and grain and grain products have composed the major portion. Most of this traffic has moved on rates lower to Galveston than to New Orleans. The movement of these commodities is to a large extent seasonal, within comparatively few months, so that during a considerable part of the year the movement through Galveston is small. The belief was freely expressed by a number of complainant's witnesses experienced in the exportation of traffic through one or more Gulf ports that a complete equalization of rates on all commodities between New Orleans and the Texas ports from and to the affected territory would within a comparatively brief period have the effect of practically closing the Texas ports and

diverting the traffic to the Louisiana ports, particularly New Orleans. Complainant and the other Texas ports expressed themselves as generally satisfied with the findings in the original report and their efforts were directed toward an affirmance of those findings. They point to the fact, subscribed to by the principal traffic witnesses for the Texas & Pacific and the Santa Fe, that the changes in relative conditions, between the Texas and Louisiana ports since the first hearing herein are of little consequence.

Voluminous and complete data were adduced showing the steamship service and facilities at the various Texas and Louisiana ports, more particularly at New Orleans and Galveston, for the purpose of showing their relative efficiency and desirability from the standpoint of the exporter or importer in handling export, import, and coastwise traffic. Generally speaking, these data show that to Pacific and Atlantic ports in this country, exclusive of Florida, to transatlantic ports, and to the Far East the Texas ports have good service, although perhaps not as dependable or as regular to many of these ports as that obtainable at New Orleans, but that to Mexico, Central America, South America, and Africa there is little or no service at the Texas ports while the service available at New Orleans is fairly good.

The proportion of vessels entering light is greater at Galveston than at New Orleans. This is due to the fact that, the volume and variety of the import traffic being substantially less, the foreign and coastwise traffic is not as well balanced as at New Orleans. The result is an increase in the average unit expense of the general cargo handled. The greater frequency of sailing and generally better service at New Orleans than at the Texas ports is largely due to the greater variety of commodities handled, both inbound and outbound, and especially to the larger volume of import traffic. Witnesses for steamship lines serving Galveston expressed confidence that an increase in the volume and variety of general cargo through that port would do much to stimulate its steamship service. Immediately following the original decision herein there was noticeable increased activity on the part of steamship interests at Galveston, and there was in prospect additional steamship service between the Texas ports and various foreign ports, particularly in the Latin America. These activities ceased upon the reopening of this proceeding. . . .

The evidence bearing upon the facilities at the various ports indicates that at the Louisiana and Texas ports the facilities are adequate to handle without serious difficulty the peak movements which are

now offering and would be likely to offer through any of those ports under the present adjustment of rates, with the single exception of grain. It leaves no doubt also that with the same exception, no serious congestion or delay would be likely to result at any of the Texas ports, if the differentials prescribed in the original report were to become effective. With respect to the handling facilities for export grain at the Texas ports, particularly Galveston, the record indicates that the establishment of differentials from all points in differential territory as defined in the original report would threaten serious congestion, especially at the port of Galveston, during a substantial portion of the annual period of normal export movement. Congestion at the port and consequent embargo usually entail great losses because of deterioration of the grain en route, tying up railroad equipment, cancellation of old and the making of new contracts, diversions, and accrued demurrage; and these losses are suffered, not by the port interests, but by interior shippers whose contracts call for delivery at the coastal elevators.

New Orleans urges that the diversion from it of a considerable portion of its tonnage would unjustly favor the privately owned and operated port of Galveston and penalize the publicly owned and operated port of New Orleans, increase the cost of handling commerce through the latter port and thereby diminish the business of the port and lessen the value of the securities issued by the dock board in control of the port facilities, hamper the dock board's construction program on the river front, and affect adversely the revenues and retard the development of the New Orleans Public Belt Railway serving the port. . . .

The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than of any of the other commodities.

New Orleans contends that the present basis of equalization promotes that healthy struggle of locality against locality which is the

best security for proper commercial development, and that therefore the public interest is best served by the present adjustment. To this complainant replies that the general advantages of New Orleans over the Texas ports are so great and of such variety that an equalization of rates does not in fact equalize. It points out that the territory served by New Orleans from and to which lower rates apply than to and from Texas ports is much greater than the territory from and to which Texas ports have an advantage in rates; that while the territory from which the Texas ports have an advantage in rates is limited, generally speaking, to points in Texas south of the line of the Texas & Pacific and, in respect of a few commodities, to points in Oklahoma and on grain and grain products from points on the Santa Fe in Kansas, New Orleans has a rate advantage from practically all of the territory east of the Mississippi River and from the greater portions of Louisiana, Arkansas, and western trunk-line territory, and enjoys the benefits from the barge lines on the Mississippi River from a large portion of the territory from which it draws its traffic. The following advantages of New Orleans not directly attributable to rates were instanced: Frequency and regularity of steamship sailings to practically all ports in the world; superior banking facilities; location of headquarters or important branch offices of leading steamship lines, export and import commission houses, and commercial representatives of foreign countries and foreign buyers; volume of exports and imports moving locally to New Orleans for storage, handling, and sale through local commission houses; volume of imports consumed locally in New Orleans; use of long-established trade routes and port arrangements; location at mouth of Mississippi River at the terminus of east-and-west rail lines and north-and-south barge lines; cheap labor cost; cheap Alabama coal for bunker use; efficient and adequate port facilities under a coördinated and unified system of public ownership and operation; fresh-water docking; and a large territory tributary to the port furnishing for movement through the port a wide variety of general cargo. Largely because of these and other advantages New Orleans draws traffic from twenty-six states and from points from which the rates are in some instances higher, in others the same, but in most instances lower than to the Texas ports, while the Texas ports, because of the absence of these advantages, can draw traffic, generally speaking, only from a limited territory in the Southwest.

The character and frequency of the steamship service from or to any port is generally determined by the character of the traffic flowing

through that port. The greater the variety of the commerce the greater the number of foreign ports that will be touched by the steamship lines serving the port, and the greater the number of ports for which commerce is handled the greater the number of steamship lines that will serve that port and the more frequent the sailings therefrom. An exhibit shows that of 452 commodities or groups of commodities moved through Gulf ports in 1924, the latest year for which statistics were available, New Orleans handled 389 in export and 168 in import movement, Galveston 196 export and 120 import, and the Sabine ports 226 export and 27 import. Complainant states that many of the commodities which constitute what is termed general cargo for vessels are produced or consumed in the affected territory in sufficient volume to afford the Texas ports a variety of commerce sufficient to attract steamship service, but that these commodities will not move to the Texas ports in substantial quantities unless they are given the benefit of a rate differential under New Orleans. Many instances were cited by witnesses for complainant in which export business from points in the affected territory was lost to the Texas ports because of the better and more frequent steamship service at New Orleans, even though the rail haul was shorter to the Texas ports than to New Orleans and the rate was the same. Exporters and importers testified that they would not locate at any of the Texas ports under an equalization of rates with New Orleans, and at least in one instance an importer abandoned a Texas port and moved to New Orleans, even though the ports were equalized, because of the superior advantages offered by the latter port.

Differentials of New Orleans and other Gulf ports and South Atlantic ports under New York and other North Atlantic ports are now in effect on all European and African import traffic destined to points on and north of the Ohio River. The foreign freight agent of the Illinois Central testified that such differentials were essential in order to enable Gulf ports to compete on a fair basis with North Atlantic ports for the reason that the steamship service at North Atlantic ports is superior to that at New Orleans. Prior to the general increases of 1920 those differentials ranged from 18 cents on first-class traffic to 6 cents on sixth-class and low-rated commodities. Since then those differentials have been somewhat increased by the general rate changes. Applying the same principle to the Texas ports complainant contends that it is justified in asking for differentials under New Orleans because of the superior steamship service to and from the latter port. It points

out that, due to superior steamship facilities, the differentials under North Atlantic ports enjoyed by Gulf and South Atlantic ports do not by any means divert to the latter ports all of the import traffic from European and African ports, and for the same reason complainant contends that the differentials prescribed in the original report would not divert more than a reasonable portion of such traffic away from New Orleans.

While such commercial advantages as are above enumerated cannot be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmation of the findings in the original report would not be likely to cause serious injury to the port of New Orleans.

Several interveners take the position that no matter what differentials may be prescribed against New Orleans on certain commodities, Galveston never was and never will be a port of any consequence as to those commodities. But Galveston is entitled to a fair opportunity to secure the foreign and coastwise traffic in such commodities, and we are certainly not justified in predicting a failure on the part of Galveston to take advantage of such opportunity. Still less would we be justified in using such a forecast as a reason for withholding what we would otherwise accord.

A port is neither the destination nor the origin of traffic passing through it. It levies toll on the traffic, in substantially the same manner as do common carriers, in its charges for use of its facilities in the transfer of traffic between the rail and water carriers. Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade. Such a policy also encourages waste in rail transportation.

The effect of differentials upon the interests of exporters and importers at Gulf ports and of shippers at interior points merits con-

sideration. The evidence in this respect is confined chiefly to grain and grain products and petroleum and petroleum products. The present equalized basis of rates gives the producer in the interior the advantage of a choice of ports, and, with the ocean rates the same, the shipper is given the fullest measure of competition between the steamship lines serving the different ports. On the heavy-moving commodities, such as grain and petroleum, a rate difference of 1 cent per 100 pounds will normally turn a sale and control the movement through one port or another. If, therefore, the shipper or exporter who ships largely or wholly through the Texas ports could secure a differential under New Orleans on his shipments he would be advantaged to that extent as compared with his competitor who ships largely or wholly through New Orleans. Conversely, the shipper or exporter who is primarily interested in New Orleans would be placed at a disadvantage under such a differential in shipping from or to points in the affected territory. Other shippers and exporters use, and prefer to continue to use, both New Orleans and one or more of the Texas ports. The investments of a number of these exporters and importers at one or more of the Louisiana ports, particularly those shipping refined petroleum and grain, would be adversely affected by a readjustment of the assailed rates on basis of differentials against New Orleans.

Sharp differences of opinion arose among interior shippers and associations as to the benefits, if any, which would result from differentials, particularly on grain and petroleum. Representatives of the Wichita Board of Trade and of farmers in southern Kansas and northern Texas favor differentials on grain, primarily because respondents propose to apply them by reducing the rates to the Texas ports. They believe that such reductions would benefit the farmer. Representatives of other grain shippers and farmers in Kansas and of Missouri River terminal markets expressed the belief that the farmer, grain elevator, and exporter would fare better under port equalization than under differentials. Oklahoma grain dealers and wheat growers favor equalization on condition that the rates to the Texas ports are maintained at the minimum of reasonableness. Grain elevators and dealers in northern Texas generally favor lower rates to the Texas ports than to New Orleans. A majority of the interior grain and flour-milling interests, including the Missouri River markets, went on record in favor of continued equalization of rates on grain and grain products to the Gulf ports. Generally speaking, all witnesses for grain

interests who favor differentials, Galveston under New Orleans, take the position that the shorter haul to the Texas ports entitles them to a lower rate than to New Orleans, and that any rate which is reasonable when applied to the Texas ports cannot be reasonable for the longer haul to New Orleans.

Witnesses for southern Kansas grain dealers stated their belief that differentials in favor of Galveston would encourage the building of interior grain elevators and markets, which would have a tendency to divert grain from Kansas City and other Missouri River markets and enable the southern Kansas markets to expand and thus compete more effectively with the larger terminal markets. Many of the Oklahoma grain and flour shippers expressed no preference either for or against equalization. Some feared that differentials might bring about congestion at Galveston, and a few favored New Orleans and equalization because of better facilities at that port for conditioning and attaining a maximum grade for their grain.

Witnesses for complainant point to the fact that the territory from which differentials were prescribed in the original report on grain and grain products is comparatively small as contrasted with the territory from which New Orleans would continue to enjoy export grain rates equal to or lower than those to Galveston. The record indicates that normally about 50 per cent of the wheat moving for export through New Orleans originates in territory other than that here affected, principally at the terminal markets such as Omaha, Nebraska, and Kansas City. During the peak movement, in July, August, and September, however, the Gulf exports of wheat are almost entirely from points in the affected territory. Export grain from Illinois, Indiana, Iowa, and the Northwest ordinarily moves up the lakes through Chicago, Illinois, and Duluth, Minnesota. Thus far corn has not been considered an export commodity. Several witnesses expressed their belief that corn could be grown in exportable quantities in the affected territory. When it does move for export it comes principally from Illinois and Iowa and not from the affected territory. Practically all of it moves through New Orleans.

Witnesses upon the question whether differentials if established by reductions in the rates on grain to the Texas ports, as proposed in the suspended schedules, would benefit the farmer expressed widely divergent views. Analysis of these views leaves the impression that the basic price of export wheat is largely controlled by the world market; that the price actually paid by foreign purchasers at particular ports,

however, generally varies with the changes in the cost of transportation, rail or water, or both; that a reduction in the rail rate to a port or ports through which a large quantity of wheat moves, such as Galveston, would probably result in at least some reduction, and most likely a corresponding reduction, in the price paid by the foreign purchaser; that if any portion of such rate reduction would not be absorbed by the foreign purchaser it would probably find its way back to the farmer on wheat unsold and still in his possession, but would probably be absorbed by the exporter, interior market, or country elevator on wheat already sold by the farmer. The latter would benefit to some extent by the increased freedom of movement of exportable wheat from the country through the ports which would be likely to result from such rate reduction, if the movement to the ports were free from congestion.

The flour-milling industry is divided upon the desirability of differentials from the affected territory. A majority of the millers at points in the affected territory who testified favored continued equalization because of the desirability of having available the steamship service from as many ports as possible. Most of the millers in favor of differentials are located at points in southern Kansas from which reductions in the export rates to the Texas ports were proposed by respondents. The preponderance of the evidence indicates that the reductions proposed on flour would redound to the benefit of the foreign buyer alone. Certain millers testified that at certain periods the facilities of both New Orleans and Galveston have been taxed with the export flour movement and that millers have been forced to forego business because they could not book vessel space in the short period within which the movement must take place. Ordinarily at least 90 per cent of the export movement of flour from the affected territory is through New Orleans. Oklahoma millers signified their preference for an increase by the amount of the differential in the rates to Galveston rather than forego rate equalization of New Orleans with Galveston. . . .

We find that the present parity of rates as between the Texas and Louisiana ports results in substantially greater service for the same rate to the Louisiana ports than to the Texas ports from and to interior points from which the short-line distance to New Orleans exceeds that to Galveston by more than approximately 25 per cent; that this parity of rates does not result in substantial injury to the Texas ports in respect of petroleum and its products, but does result in substantial injury to and prejudice against the Texas ports in respect of the other

commodities considered, except on grain and grain products from points in southern Kansas north of the line of the Chicago, Rock Island & Pacific, hereinafter called the Rock Island, from the Kansas-Oklahoma state line through Liberal to Hutchinson, Kansas; and that the competition relied upon by defendants herein is no justification for the resulting prejudice from and to the interior points referred to. . . .

We find in No. 12798 that the present relationships of the assailed carload rates on export, import, and coastwise traffic in the commodities enumerated in the findings on page 123 of the original report, excepting petroleum and petroleum products, rosin from Texas points, green coffee to points other than Texas, and grain and grain products from points in southern Kansas as hereinbefore defined, north of the line of the Rock Island from the Kansas-Oklahoma state line through Liberal to Hutchinson and west of the line of the Missouri Pacific from Hutchinson through Sterling and Lyons to Kanopolis, from or to points in southwestern Louisiana, as hereinbefore defined, Arkansas, Texas, excepting points on the Texas & Pacific and Louisiana Railway & Navigation system, Oklahoma, and southern Kansas, as hereinbefore defined, and in bagging (cotton-bale covering), cotton-bale ties, and buckles to points in Oklahoma, are, and for the future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates and unduly preferential of New Orleans.

We further find that this undue prejudice should be removed by establishing, from or to interior points from which the short-line distances to New Orleans do not exceed those to Galveston by more than approximately 25 per cent, rates to or from Galveston and the other Texas ports taking the same rates, as the case may be, which do not exceed the contemporaneous rates on the same commodities to or from New Orleans; and by establishing, from or to interior points from which the short-line distances to New Orleans exceed those to Galveston by more than approximately 25 per cent, rates to or from Galveston and the other Texas ports taking the same rates, as the case may be, which do not exceed rates which are less than the contemporaneous rates on the same commodities to or from New Orleans by the following differentials on the respective commodities named: [The differentials on the various commodities range from 1 to 9 cents.] . . .

The differentials prescribed on most of the commodities considered, if applied in full on rates to or from New Orleans or on the rates to or from the Texas ports, would result in severe differences in rates to the

same port from or to contiguous points on both sides of the border line between differential and so-called equalized territories. But such differences are inherent in group adjustments. They can be mitigated by the carriers if they will apply the differential in part to the rate to or from New Orleans and in part to the rate to or from the Texas ports, or by applying a graded differential at intermediate points in so-called equalized territory.

The differentials approved or prescribed herein will be understood to be minimum differentials. Defendants will be expected to grade up the differentials prescribed from or to points in Texas so that for the shorter distances between Galveston and Texas points more appropriate recognition may be given to the greater differences in distance to or from the two ports. In applying the above basis minor deviations may be made for the purpose of avoiding fourth-section departures which would result from a rigid observance, but wherever such deviations occur care should be exercised to avoid undue preference of one port, or set of ports, to the disadvantage of another port, or set of ports.

The record is not sufficiently complete to warrant us in prescribing relationships between the rates to or from the Texas ports, on the one hand, and New Orleans on the other, on commodities, or from or to points, other than those embraced in the foregoing findings. It is expected, however, that the relationships herein prescribed will serve as a guide to defendants in readjusting the rates on other export, import, and coastwise traffic where undue prejudice such as is condemned in this report exists. . . .

[Commissioners CAMPBELL, MCMANAMY, and TAYLOR wrote opinions concurring in part, and Commissioners MEYER, EASTMAN, and LEWIS approved the opinion of Commissioner CAMPBELL. Commissioners HALL and WOODLOCK wrote dissenting opinions.]

QUESTIONS

1. How are shipping facilities related to the localization of industries?
2. Explain the reasons for the growth of Chicago; of St. Louis; of Houston; of Denver.
3. In the case quoted what economic advantages would have come from general equality of rates to Galveston and New Orleans?
4. Is there a justification for continuing the advantages that a city has enjoyed in the past even though these advantages may mean possible loss to other cities?

5. Explain the various ways in which cities or markets may compete. How may railroad rates affect such competition?

6. City A enjoys through carload rates from an important manufacturing center. Rates from the same center to B, one hundred and fifty miles from A, are the rate to A plus the local rate from A to B. What effect does this have on the jobbing industry in A and B?

7. Commodity rates on coal enable city X to secure fuel at forty cents per ton less than Y, its neighbor, thirty miles away. Will this be of any importance to the commercial development of the two cities?

8. A carrier has spent large amounts of money in developing the port facilities of a certain city. To promote the use of these facilities, it files schedules giving this city slightly lower rates than other ports in the same general locality. Under what conditions should the Commission suspend the schedules? Does a decision from the economic point of view agree with a decision from the point of view of law?

9. Should railroad rates ever be used as a means of promoting the growth of certain centers?

10. What general advantages to a center may come from the promotion of one city at the expense of another?

11. Suggest a simple rule for the solution of the rate question and its effect on rival cities. Will your rule work in all cases? in most of them?

c. COMMODITY COMPETITION

Vitrolite Company *v.* Atchison, Topeka & Santa Fe Railway Company

Interstate Commerce Commission (1924), 89 I. C. C. 367

Division 1, Commissioners McChord, Lewis, and McManamy

BY DIVISION 1:

Exceptions were filed by defendants to the report proposed by the examiner, and the case was orally argued.

Complainant, a corporation manufacturing Vitrolite at Parkersburg, West Virginia, with principal office at Chicago, Illinois, alleges by complaint filed January 24, 1923, as amended, that the classification ratings of that commodity, in carloads and less than carloads and the rules, regulations, and practices applicable to its transportation are unreasonable, unjustly discriminatory, and prejudicial. We are asked to prescribe reasonable and nondiscriminatory ratings, which shall be no higher than those contemporaneously applicable on competitive marble and tile.

The Indianapolis Chamber of Commerce and Marietta Manufacturing Company, Indianapolis, Indiana, intervened in support of the complaint.

Vitrolite is a vitreous commodity, manufactured and shipped in slab form. It is opaque and closely resembles porcelain in appearance. In structural work, it is used extensively as store fronts, wainscoting, on walls and ceilings, and as partitions in lavatories and shower baths. It is also used for table and counter tops and analogous purposes. The ingredients are sand, feldspar, fluorspar, cryolite, lepidolite, manganese, arsenic, borax, antimony, china clay or kaolin, soda ash, and nitrate of soda. These are purchased at different places in the country and shipped by rail to Parkersburg. A batch, in powdered form, is mechanically mixed, placed in a melting tank, and heated to approximately 3000° F. The molten mass is then poured on a casting table and rolled to desired thickness, after which it is annealed, placed on cutting table, and cut to required dimensions. Its character results from the proportions in which the raw materials and fluxes are mixed. A smooth lustrous surface is produced by the atmosphere in the process of crystallization. The industry has been developed within the last two decades.

The slabs vary in thickness from five-sixteenths inch upward. They, as well as marble slabs, are shipped in crates in an approved or prescribed manner. Tile is packed in barrels, boxes, or crates. Ordinary box-car equipment is used. The edges of Vitrolite counter and table tops are smoothed and polished and frequently beveled on one side of the slab, on which account they take higher ratings than the wall slabs. Complainant says that this is unjust, because counter and table tops are usually thicker and less susceptible to damage than the wall slabs, and no such distinction is made in rating marble and slate slabs used for similar purposes, or in plate glass or mirror and shock glass. . . .

Complainant also asks that the name Vitrolite be inserted in the classification in order that the material may be so designated in the billing. This term is a registered trade-mark, which no other manufacturer may use, even though his product may be substantially identical with Vitrolite. Since each manufacturer has a different name for his commodity, the inadvisability of requiring this to be done is apparent.

Intervener Marietta Manufacturing Company makes a product called Sani-Onyx, substantially similar in composition, appearance, and methods of manufacture to Vitrolite and used for the same

purposes. It asks that our findings herein embrace Sani-Onyx. The record also shows that the Pittsburgh Plate Glass Company manufactures a similar commodity known as Carrara Marble. Obviously, these and analogous products having identical uses should take the same ratings. This is conceded by defendants.

Vitrolite is shipped in carload quantities to construction companies or agents at distributing centers throughout the United States and Canada. The less-than-carload shipments are generally from such points and also from the factory at Parkersburg. Photographic illustrations of the various uses of Vitrolite, Sani-Onyx, and analogous products were introduced. They all tend to confirm the testimony that the uses in general are not those of glass but of marble and tile, and that competition is confined almost wholly to the last-named article.

Compression and cross-bending tests indicate a superiority of Vitrolite over various competitive marbles in these characteristics. It is said to be less fragile than plate glass, marble slabs, and tile. These properties diminish its susceptibility to loss and damage in transit. The demand for Vitrolite for structural purposes is said to be increasing, and its desirability as railroad traffic is emphasized. Complainant insists that the rating should be determined by recognized transportation characteristics, such as loading, loss and damage hazard, use, competition, form of packages, value, etc., and not by the kinds of chemical ingredients used in its manufacture.

Ordinary tiling, which takes the same ratings as marble, has a glaze or vitreous surface applied on a baked clay body. This is said to make it more susceptible to damage in transit than the homogeneous Vitrolite slabs. Marbleized slate slabs take the same carload ratings as marble slabs and differ in less-than-carload ratings only in being in third class in western classification instead of fourth class. They also compete with Vitrolite.

The market value of Vitrolite at time of the hearing was \$1.10 per square foot for $\frac{3}{4}$ -inch stock slabs, \$1.23 for cut sizes, \$1.46 for pieces with ground edges, and \$1.70 for pieces with ground and polished edges. Marble of $\frac{3}{4}$ -inch or $\frac{7}{8}$ -inch thickness varied from \$0.62 to \$2.55 per square foot for the different grades and kinds of finish, not including certain high-priced imported grades. They averaged approximately the same as the prices on Vitrolite. All prices are at the factory, quarries, or port of entry. Marble producers are said to control the price level that complainant must approach in order to successfully compete.

Present ratings on Vitrolite slabs are 22 per cent higher than those on marble in carload quantities and 20 per cent higher in less-than-carload quantities, as measured by class rate for typical hauls referred to by complainant. Commodity rates are applicable on carload shipments in most instances, but to some points they are greater than the class rates in effect at the ratings applicable on marble slabs. Less-than-carload shipments on both Vitrolite and marble move at class rates.

The average weight of all carload shipments of Vitrolite from Parkersburg during 1922 was 43,821 pounds, under a tariff minimum of 36,000 pounds. It can be loaded to the full capacity of the car. Loss and damage claims amounted to 0.77 per cent of the freight revenue paid. No similar data for marble slabs are shown. Loss and damage claims on all traffic of Class I roads for the calendar year 1920 amounted to 2.795 per cent of the freight revenue. In 1921 and 1922 they amounted to 2.078 and 0.999 per cent, as reported by our bureau of statistics. . . .

Competition in use is almost entirely with articles classified as natural and perhaps artificial stone. These classifications already specify blocks, pieces or slabs, polished, n.o.i.b.n., at the same ratings and carload minima as sought by complainant. There is no apparent reason why Vitrolite should take higher ratings than carved, lettered, or dressed granite, jasper, marble, onyx, or other stone blocks or slabs similarly finished and not indexed by name. When a commodity is not distinctly within some common designation, its use and the ratings of competitive products are important factors with its transportation characteristics in the determination of what rating is appropriate for it. . . .

Defendants seek to justify the difference in rating of the pieces with finished edges on the ground that they are in an advanced stage of manufacture. The cost of smoothing and polishing the edges is approximately 2.7 cents per linear inch for three-fourths-inch slabs. Similar improvement apparently is not recognized as sufficient to warrant a distinction in rating of the competitive products under the headings of natural stone or tile, or of the items classified as glass. . . . Complainant exhibits an extensive list of other articles in the consolidated classification in which no difference in rating is made because of a slight degree of fabrication or improvement. The stage of manufacture of an article is important as a guide in classification only in so far as it indicates the transportation characteristics of the

article, such as its loading qualities, value, and transportation. Rates on Lumber and Lumber Products, 52 I. C. C. 598. In any event consistency is desirable, particularly as to competitive commodities. . . .

We find that the ratings assailed are and for the future will be unreasonable and unduly prejudicial to complainant to the extent that on Vitrolite slabs and table and counter tops in excess of five-sixteenths inch in thickness they exceed the rating contemporaneously applicable on marble slabs and table and counter tops, respectively, and on Vitrolite scale platters to the extent that they exceed ratings greater than one class higher than the ratings contemporaneously applicable on Vitrolite slabs and counter and table tops.

An appropriate order will be entered.

QUESTIONS

1. How do commodities compete?
2. Of what importance to competition among commodities are railroad rates?
3. Illustrate how competition among commodities worked in the case quoted.
4. How did the Commission's decision alter the competition among the commodities concerned?
5. Imitation leather is charged a higher rate than real leather. Is such a difference reasonable?
6. It is urged that rates on Cream of Wheat and on flour should be the same. Decide.
7. Rates on lard substitutes exceed those on lard. Is a difference unreasonable and unduly prejudicial?
8. Should analogous products having the same uses always take the same rates?

K. REGULATION OF FACILITIES

1. CAR SERVICE

[A]

[The pertinent statutory provisions are found in Section 1 of the Interstate Commerce Act, paragraphs 10 to 17, inclusive (I. C. Act, pp. 7-9). Portions of these paragraphs were contained in the Esch Car Service Act of May 29, 1917. The power of the Commission was

increased in 1920 by the addition of paragraph 12; of paragraph 15, subdivisions (c) and (d); of paragraph 16; and of the words "use, control, supply, locomotives, other vehicles," and "including special types of equipment and the supply of trains" in paragraph 10; and by certain other less important changes.]

[B]

The Assigned Car Cases

United States Supreme Court (1927), 274 U. S. 564

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These five suits were brought in the Federal court for eastern Pennsylvania under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, to enjoin and annul an order of the Interstate Commerce Commission. The order, which was to become effective March 1, 1925, prescribes for all railroads subject to its jurisdiction a so-called "Assigned Car Rule" governing the distribution of cars among bituminous coal mines in times of car shortage. Assigned Cars for Bituminous Coal Mines, 80 I. C. C. 520; 93 I. C. C. 701. Some of the plaintiffs are operators of coal mines, some distributors of coal, some large private consumers of coal, and some are railroads. All had been parties to the proceeding before the Commission in which the order was entered. The defendants in each case are the United States, the Interstate Commerce Commission, and various intervening mine operators. All the defendants answered. The cases were heard together on the evidence before three judges. A final decree granting the relief prayed for was entered in each case on December 15, 1925. *Berwind-White Coal-Mining Co. v. United States*, 9 F. (2d) 429. The cases are here on appeal under Section 238 of the Judicial Code as amended.¹ They were argued together.

The term assigned cars is used in contradistinction to system cars. By assigned cars are meant those placed for use at a specified mine for a particular shipper. By system cars are meant those, from time to time on the line, which are being kept available for use at any mine for any shipper. Assigned cars are of two classes. One class of assigned cars consists of private cars. These are cars owned (or leased) by some shipper (or subject to the control of a particular person not a rail

¹ Footnotes are omitted throughout the case.

carrier) who delivers them to the railroad for placement at designated mines for loading and transportation as desired by the owner of the cars. Assigned cars of the other class are called railroad fuel cars. These consist wholly of cars owned (or leased) by some carrier, which, instead of being left, like system cars, for use indiscriminately in carrying coal from any mine for any consignor to any consignee, are assigned to a particular mine to carry coal to be used as fuel by a particular carrier.

Four of the suits were brought by private car owners. They illustrate different conditions under which, or different purposes for which, private cars are so used. The plaintiffs in No. 709 are coal merchants who operate mines. The plaintiffs in No. 710 are integrated concerns which operate mines solely in order to supply coal to their manufacturing plants. The plaintiffs in No. 711 are by-products coke concerns which do not operate any mine. The plaintiff in No. 712 is a public utility which does not operate any mine. In each of these four cases the cars owned were acquired by the shipper, and are used, solely in order to assure transportation of an indispensable supply of coal. The number of coal cars used on the railroads of the United States is estimated as between 900,000 and 950,000. Of these about 29,000 are private cars.

The fifth suit, No. 606, is brought by owners of railroad fuel cars. The plaintiffs in it are 35 railroads, including many of the leading bituminous coal carriers of the United States and representing each of the several classes of railroad fuel car owners. Railroad fuel cars are divided, according to ownership, into foreign fuel cars, that is, those which belong to, and are used for the fuel supply of, a carrier other than the one on whose lines the mine is located; and home line or system fuel cars, that is, those which are owned by, and are used to supply fuel to, the carrier on whose lines the mine is located. Railroad fuel cars are further classified according to the ownership, use and character of the mine to which they are assigned. That is, whether the cars are used wholly in connection with a mine owned by the carrier which owns the cars; whether they are used in connection with a mine not owned by such carrier but whose whole output is contracted for by it; or whether the mine at which the cars are to be placed is a "commercial" one, that is, a mine which supplies coal also to the general public. About 28 per cent of all bituminous coal mined is consumed by railroads. The number of the railroads to which the prescribed rule applies is 3073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order.

The subject of discrimination in the distribution of coal cars in times of car shortage has occupied much of the time of the Commission ever since its establishment. Some general investigations of the matter were undertaken by it pursuant to resolutions of Congress. Many specific inquiries were made in passing upon complaints of individual shippers who charged unjust discrimination by individual carriers. In two of these cases, *Railroad Commission v. Hocking Valley Ry. Co.*, 12 I. C. C. 398; *Traer v. Chicago & Alton R. R. Co.*, 13 I. C. C. 451, a rule or practice was prescribed for individual carriers, in 1907 and 1908, which was approved by this court upon review in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452. That practice, which became known as the Hocking Valley-Traer rule, was later adopted, either voluntarily or pursuant to orders of the Commission, by other carriers. So far as concerned private cars, the rule was, in substance, adopted, during Federal control, by the Railroad Administration. Car Service Circular 31 — effective October 10, 1918; revised December 23, 1919. Upon the termination of Federal control, the Commission issued a notice to carriers and shippers (dated March 2, 1920) recommending "that until experience and careful study demonstrated that other rules would be more effective and beneficial," the uniform rule contained in that circular should be continued in effect. Later (April 15, 1920), it recommended that the Hocking Valley-Traer rule be applied by the carriers also to railroad fuel cars. But no uniform rule concerning assigned cars applicable to all carriers had been prescribed by the Commission until the entry of the order here complained of; and much diversity in practice existed. Many of the railroads had secured their coal during periods of car shortage without resort to the use of assigned cars; and one, at least, of the leading bituminous coal carriers of the United States declines to permit the use of any assigned cars on its lines.

The rule here assailed was the fruit of an investigation commenced by the Commission of its own motion, in March, 1921, with a view to prescribing just and reasonable rules applicable to all carriers concerning the use of assigned cars for bituminous coal. Every carrier subject to its jurisdiction was made a respondent. Private coal car owners, coal mine operators, coal miners, coal distributors and large coal consumers became parties by intervention. The evidence introduced occupied nearly 6000 pages. The investigation extended over four years. The reports of the Commission on the original hearing

and the rehearing occupy 117 pages of the record. It concluded that the practices expressed in the Hocking Valley-Traer rule, and other existing regulations of carriers, resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices. And it prescribed the uniform rule which prohibits any carrier from placing for loading at any mine more than that mine's ratable share of all cars, including assigned cars, available for use in the district; unless the carrier is permitted to place more by an emergency order issued by the Commission pursuant to paragraph (15) of Section 1 of the Interstate Commerce Act as amended by Section 402 of the Transportation Act, February 28, 1920, c. 91, 41 Stat. 456, 477. This rule requires that, in determining how many cars are available in the district, the carrier placing the cars shall count all cars; that is, it must include with those owned by it, all owned by foreign railroads and assigned for their fuel service and likewise all owned by private shippers and assigned for their service. Thus, the prohibition embodied in the rule applies to all carriers, whatever the character of the consignor or consignee, and whatever the use to which the coal is to be put.

The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each with a rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by Mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by Mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called system cars. The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars, which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the aggregate available coal transportation facilities.

The order here assailed differs from the Hocking Valley-Traer rule approved in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, *supra*, in two respects. Under the Hocking Valley-Traer rule the carrier was permitted to place at a mine all the cars (whether private or railway fuel cars) which had been assigned to it, even if the number assigned exceeded its pro rata of all available cars. The prohibition formerly imposed was merely upon placing at a mine any system cars, if it had its full quota from assigned cars. Under the rule here assailed, the carrier is prohibited from placing at a mine more cars than its pro rata, even if all sought to be placed are assigned private cars or railway fuel cars. Moreover, the rule here assailed is a uniform rule governing all carriers without regard to their particular circumstances, whereas the Hocking Valley-Traer cases prescribed a practice for the individual carrier after it had been found, upon specific inquiry, that the carrier had been guilty of undue discrimination. Thus, the earlier orders were in their nature largely judicial. The order here attacked is wholly legislative.

No question is here involved concerning those rules, regulations or practices of the carriers by which the ratings of the several mines are determined. See *In re Rules Governing Ratings of Coal Mines*, etc., 95 I. C. C. 309. No question is raised concerning the limits of the districts into which the carriers' lines are divided for the purpose of applying the rule. No question is raised concerning the adequacy of the supply of system cars. See *Car Shortage*, etc., 12 I. C. C. 561; *Car Supply Investigation*, 42 I. C. C. 657. Nor is any question presented here concerning the compensation of, or allowance to, private car owners for the use of their cars in performing the transportation under the tariffs. See *Matter of Private Cars*, 50 I. C. C. 652. There was confessedly no irregularity in the method of proceeding pursued by the Commission. There is a faint contention that the only remedy for violation of the rule is prosecution for the penalty provided by the statute; and that the Commission exceeded its authority in enjoining the placing. The contention is clearly groundless. The order is in a form which, in other connections, has been approved by this court. *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612; *United States v. Union Stock Yard Co.*, 226 U. S. 286; *Pipe Line Cases*, 234 U. S. 548, 561. The sole question requiring consideration is the validity of the requirement that, unless permission is given by the Commission, carriers shall, in placing assigned cars, be limited to the mine's quota, although the number of cars assigned to it exceeds the quota.

The order is challenged on several grounds. All of the plaintiffs insist that in prescribing a universal rule the Commission has exceeded the powers conferred by Congress. All of the plaintiffs appear to attack the rule also on the ground that it is inherently unreasonable. Some insist that the order is unsupported by the findings and the evidence. Some that the rule involves a taking of property without due process of law. The private car owners urge specifically that the rule is an arbitrary interference with the use of their own property. The railroads urge especially that the rule is an illegal interference with their right to manage their own affairs.

First. There is clearly no constitutional obstacle. The rule prescribed does not involve a taking of the property of the private car owner. Congress could exclude private cars from interstate railroads. Compare *United States v. Delaware & Hudson Co.*, 213 U. S. 366, 405-406, 411, 415. And it may prescribe conditions on which alone they may be used. See *Procter & Gamble Co. v. United States*, 225 U. S. 282; *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281. Limiting their use does not involve regulation of the coal-mining industry. Likewise, Congress may prescribe how carrier-owned cars shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation facilities.

Second. The main question for decision is one of statutory construction. It is whether Congress has vested in the Commission authority to prohibit a use of assigned cars by a general rule, which in its judgment is necessary to prevent unjust discrimination among mines or shippers and to provide reasonable service. The legislation to be construed is paragraphs 10 to 17, added to Section 1 of the Interstate Commerce Act by Section 402 of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 476. . . .

Three widely divergent constructions of paragraph (12) are urged. The railroads contend that it prescribes a rule of distribution complete in itself; that the rule there prescribed is the Hocking Valley-Traer rule; and that the provision neither requires nor permits action by the Commission supplementary thereto. In support of this view the congressional history of the provision is particularly relied upon. The United States contends also that paragraph (12) prescribes a complete rule of car distribution; but its insistence is that the statute abolished the Hocking Valley-Traer rule and substituted for it a rule identical with that ordered by the Commission. Support for its view is sought

particularly in the penalty provision of paragraph (12), in the provision of paragraph (10) which defines car service, and in paragraph (11) which prohibits any unjust and unreasonable practice in respect to car service. The Commission contends that paragraph (12) does not prescribe a complete rule; that it does not require either pro-rata distribution of cars or distribution according to the Hocking Valley-Traer rule; that it requires merely that all cars be counted as the basis for determining the pro-rata share of each mine; and that it leaves to the Commission administrative discretion to determine how the cars shall be distributed. The Commission's contention is, in our opinion, the sound one. It gives effect to the command that all cars shall be counted; and it leaves full scope both to the duty imposed upon the carriers in paragraph (11), and to the authority conferred upon the Commission in paragraph (14), to establish reasonable rules with respect to car service. This construction is consistent also with the legislative history of the provision, including the action of the conference committee by which the differences between the Senate and House bills were reconciled.

One other question of statutory construction is urged by the railroads. They deny the authority of the Commission to deal with the distribution of railroad fuel cars. They point to paragraph (10) of Section 1, which defines "car service" as including the distribution of cars "used in the transportation of property." The contention is that, because of the phrase quoted, the Commission's authority to make reasonable regulations with respect to car service, conferred by paragraph (14), is limited to the supervision of the performance by railroads of their common-carrier duties of transportation for the public, and does not extend to supervision of their activity in securing fuel for use by the carrier. The contention is, in our opinion, groundless. So far as concerns foreign railroad fuel cars, the owner is obviously in the same position as a private shipper. Carrying coal by a railroad for its own use as fuel is likewise transportation. See *Interstate Commerce Commission v. Ill. Cent. R.R. Co.*, 215 U. S. 452, 474. It would require very explicit language to convince us that Congress intended to permit discrimination if effected by the use of railroad fuel cars. Moreover, the phrase in question appears also in paragraph (12), which provides that the carrier must count against the mine all cars used "for transportation of coal."

Third. It is contended that the rule prescribed is void because unreasonable. Most of the evidence and much of the briefs and argu-

ments were directed to showing the hardships, waste and losses which would result from the prescribed restriction on the use of assigned cars. Private car owners urge that assigned car mines will be compelled to reduce loadings to conform to the average of system car mines; that private coal cars, representing large investment and sorely needed by their owners, will stand idle on the tracks; that steel industries will be partially or completely shut down and thousands of steel workers will be thrown out of employment; that coke and by-product companies will be partially or completely shut down and their employees temporarily deprived of their means of livelihood; that public-utility companies will be compelled to resort to the unsatisfactory and uneconomic spot market for coal; that the supply of gas and electricity to the public will be seriously curtailed; that coal-burning steamships will be delayed in sailing; and that the further development and expansion of the important by-product coke process will cease. The railroads urge that the prescribed rule will deprive them of the only effective means of procuring at all times, in dependable volume, suitable coal essential to their operation; that it will increase the cost of coal to them by preventing their running at full capacity the mines owned by them or those whose product they contract for; that it will increase the cost of operation also by depriving them of coal of uniform and approved quality; that in times of greatest car shortage it will involve the non-use by them of a large number of unused private cars; and that it will otherwise prevent efficient transportation service.

There was much evidence that the practice which had been sanctioned in the Hocking Valley-Traer cases did not operate satisfactorily. The Commission concluded that it was "not the fruition of ripe experience." Compare *Hillsdale Coal & Coke Co. v. Pennsylvania R. R. Co.*, 19 I. C. C. 356, 387. The effort to formulate a rule which would prevent discrimination was resumed. The Commission found that the existing assigned-car practice reduces to a certain extent the supply of cars furnished to commercial mines; that the larger and steadier supply of cars gives the assigned-car mines a great advantage in steadiness of operation, and hence in cost of production, in the selling markets, and in the labor market; and that, apart from the discrimination inherent in the assigned-car rule, the carriers have been guilty of other willful discriminatory practices, which, as a practical matter, it would be difficult to prevent as long as the rule prevailed. It found also that the use of private cars tends more and more to produce inequalities in the use of other facilities, such as locomotives, tracks, and

terminals; and that many, at least, of the so-called car shortages have been due not to an absence of cars but to an inability to move them, i. e. to a shortage of such other facilities. It found, also, that the railroads could, by various devices, obviate most of the difficulty in securing fuel, which they anticipated would result from the order here attacked.

The argument most strongly urged is that, because the rule prescribes absolute uniformity, regardless of the necessities of the railroad or other consumer, regardless of the ownership of the mine or the cars, regardless of the character of the business done by the mine or its customer, it is necessarily unreasonable, and, hence, that the order is void. But the authority to establish reasonable rules conferred by paragraph (14) includes power to prescribe a rule of universal application. There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission (*Western Papermakers' Chemical Co. v. United States*, 271 U.S. 268, 271); or to inquire into the soundness of the reasoning by which its conclusions are reached (*Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corporation v. United States*, 249 U.S. 557, 562); or to question the wisdom of regulations which it prescribes (*United States v. New River Co.*, 265 U. S. 533, 542). These are matters left by Congress to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454.

We cannot say that it was arbitrary and unreasonable for the Commission to conclude that good service could be secured by a uniform rule which might be departed from with its consent and that unjust discrimination could not be prevented without such a uniform rule. It acted in the light of a rich experience. It had learned by experience that the existing practices resulted in discrimination and unsatisfactory service. It had learned, also through experience, that the emergency powers conferred by the Transportation Act, 1920, afforded adequate means of supplying the needs and of averting the possible hardships and losses, of carriers and of private coal consumers, to which the evidence and arguments had been largely directed. For the Commission had had much experience in applying these emergency powers in connection with this distribution of coal cars in times of car shortage, before it prescribed the rule here challenged. Moreover, so far as concerns railroad fuel cars, the operation of the rule as modified

from time to time by emergency orders would resemble the practice of Car Service Section of the Railroad Administration during Federal control.

Fourth. The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception. This objection was directed particularly to the finding that the existing practice in regard to assigned cars results in giving to the mines enjoying assigned cars an unjust and unreasonable share of railroad services and of facilities other than cars. The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare *New England Divisions Case*, 261 U.S. 184, 196-197; *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274, 291. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under Sections 1, 3, and 15 of the Interstate Commerce Act. In the case cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

Fifth. Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunity. The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. In essence, the power exerted is the same as that sustained in *Interstate Commerce Commission v. Illinois Central R. R. Co.*, 215 U. S. 452, where it was held that the Commission had power to prohibit the use of any system car, if the private cars assigned to the mine equaled its quota. The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive

of self-interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service. Compare *United States v. Illinois Central R. R. Co.*, 263 U. S. 515, 523, 524; *Virginian Ry. Co. v. United States*, 272 U. S. 658, 663-665. The contention is admittedly baseless if, as we have concluded, there is evidence to support the finding that the assigned-car practice causes discrimination in the use of other transportation facilities. For the appellees concede that the possession of private cars confers upon them no superior claim to other services.

The order challenged is valid. The bills must be dismissed. The decrees are

Reversed.

The separate opinion of MR. JUSTICE McREYNOLDS. . . .

To me it seems plain enough that the real purpose of the order was not rationally to control distribution of cars during times of shortage, but to force railroads and other large consumers to apportion their purchases of coal among a larger number of producers and thus advantage mines from which such consumers preferred not to buy. Both carrier and large manufacturer must have steady supplies of suitable coal, and it may be highly important to obtain these from one or a few approved mines. But if such mines are to be denied fuel and private cars during times of shortage, then for their reasonable protection these great consumers probably will endeavor to scatter their orders.

The railroads of this country are private property. They must be operated by their owners according to law under supervision of the Interstate Commerce Commission; but that body is not intrusted with their management and ought not to be permitted to assume it under any guise. In practice, carriers must use many cars daily for gathering fuel necessary for their operations, and I know of no authority possessed by the Commission to prevent them from purchasing this where and as their managers think best. To permit such interference under the mere guise of a rule for distribution of cars seems to me altogether wrong.

Upon this record we must assume that the carriers have met their obligation to provide an adequate number of system cars.

The practice of hiring and using private cars by railroads has been recognized and accepted by both Congress and the Commission. It has enlarged the total number of cars available for use and thereby

aided all shippers. Those who provide private cars take nothing from any other shipper, but heretofore have secured the use of such cars for themselves although, because of temporary shortage, the system cars were insufficient to meet the demands of others.

If the order was intended to enlarge the total supply of cars or bring about more equitable distribution of available cars in times of shortage, it was foolish. Supply cannot be increased, nor equitable distribution enforced, by prohibiting the use of private or fuel cars when most needed — requiring them to stand idle on the sidings. If, on the other hand, as I must think, the real purpose is to force large consumers to scatter their purchases, the order goes beyond any power intrusted to the Commission.

The decree below should be affirmed.

QUESTIONS

1. Is a common carrier required to furnish transportation for any freight that may be presented to it?

2. Must a railroad furnish cars to shippers at their request?

3. A and B, two companies with adjacent plants, request a like number of cars of a similar type from carrier X. The latter furnishes A with all the cars requested and B with less than half the number requested. Is the carrier liable to B for damages sustained?

4. Why did Congress deem it necessary to embody in a Federal statute the common-law obligations of carriers to furnish cars to shippers?

5. Exactly what power does the statute give the Interstate Commerce Commission over regulations of car service?

6. What reasons are there for laying down in the statute specific rules concerning the furnishing of coal cars? Do such rules constitute an unreasonable classification?

7. How are "just and reasonable ratings" of coal-mining companies fixed?

8. Distinguish between assigned cars and system cars. What are the different types of assigned cars?

9. Why should a coke concern or a public utility wish to own coal cars at the present time?

10. What advantages would such ownership have given if the Commission's decision had not been upheld?

11. Explain the discrimination that might result from permitting the unlimited use of his own cars by a coal merchant in time of car shortage.

12. What basis is there for Justice McReynolds's opinion that the purpose of the Commission's order was to force large consumers of coal to scatter their purchases? Might that be the effect of the order?

13. The Commission orders that the distribution of cars to mines located on two or more railroads be such that, from the point of view of car supply, most of the advantages of such mines over mines located on a single road are eliminated. It is contended that the order deprives the first group of mines of property without due process of law. Decide.

14. In time of emergency the Commission gives to coal to be used for certain purposes preference over coal transported for other purposes. The Commission's order is attacked in the courts. What features of the order will the courts consider? What will their decision be?

15. In October, 1922, the Commission issued to corporations not directly engaged in interstate commerce and to municipalities orders concerning the distribution of coal. What power had the Commission to make such orders?

16. A railroad is ordered by the Commission to supply shippers, upon reasonable request and notice, with tank cars for the interstate shipment of petroleum. Will such an order be upheld?

17. What are the limits of the Commission's powers over the car service of the carriers?

2. USE OF TERMINALS

[A]

[The pertinent statutory provisions are contained in Section 1 of the Interstate Commerce Act, paragraphs 15-16, and in Section 3, paragraph 4 (I. C. Act, pp. 8-9, 15-16).]

[B]

Port Arthur Chamber of Commerce *v.* T. & F. S. Ry. Co.

Interstate Commerce Commission (1922), 73 I. C. C. 361

CAMPBELL, *Commissioner*:

. . . Complainant asks us to require one road to switch traffic for another road to and from the port facilities at Port Arthur, Texas, assuming that the service, if required, will be performed at a nominal switching charge. Charges are stated as of the time of the hearing, January, 1921.

The Kansas City Southern has a through line from Kansas City, Missouri, to Port Arthur. It owns and operates docks, wharves, and other port facilities at the latter point, and has a practical monopoly

of water-front facilities. About twenty miles north of Port Arthur it passes through Beaumont, Texas, crossing the Southern Pacific, one of whose lines also reaches Port Arthur, paralleling the Kansas City Southern between Beaumont and that point. There are physical connections and interchange arrangements between these lines at both Beaumont and Port Arthur. The Southern Pacific has no port facilities at Port Arthur, and all its export and import traffic transshipped at that point must be handled through the facilities of the Kansas City Southern. At present that road refuses to switch on the basis of a nominal switching charge any export and import traffic, except lumber and timber, between the port facilities and its connection with the Southern Pacific at Port Arthur, although it regularly switches domestic traffic at Port Arthur at a charge of \$3.50 per car and export lumber and timber at \$4.50 per car. The switching distances average about 1.5 miles. . . .

It is the general policy of the Kansas City Southern to require all export and import traffic originating at or destined to points on or via the Southern Pacific and transshipped at Port Arthur to move via Beaumont and to pay the Kansas City Southern a regular division of the joint through rate. When traffic, other than lumber and timber, is permitted to move via Port Arthur, the Kansas City Southern generally requires the same division as it would have received had the traffic moved via Beaumont. Complainant, a commercial organization at Port Arthur, alleges that the general requirement of the Kansas City Southern that export and import traffic, other than lumber and timber, move via Beaumont and (or) pay a division of the through rate instead of a nominal switching charge is unreasonable. Complainant does not seek a reduction in the through freight charges, but contends that the requirement operates detrimentally to Port Arthur and its business interests in that it diverts traffic to other ports for the reasons hereinafter given.

What complainant seeks is in substance an arrangement legally possible only through a condemnation of the terminals of the Kansas City Southern for the use of its competitor, the Southern Pacific. With respect to such matters paragraph (4) of Section 3 of the act provides as follows: [This is referred to in [A], *supra*.]

. . . We have held that the above-[mentioned] provision applies to the opening of terminals by requiring a switching arrangement as well as by requiring a physical use. *Hastings Commercial Club v. C. M. & St. P. Ry. Co.*, 69 I. C. C. 489.

If complainant's prayer is granted it will be the equivalent of the establishment of a through route and a joint rate via the Port Arthur interchange, which would embrace less than the full length of the Kansas City Southern between the point of origin and destination. In this connection paragraph (4) of Section 15 of the act provides :

In establishing any such through route the Commission shall not (except as provided in Section 3, and except where one of the carriers is a water line), require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established : . . .

In view of the parenthetical clause beginning in the first line of the last above-quoted provision of the act, it is apparent that the limitation put upon our authority to establish through routes and joint rates does not apply where we find it to be in the public interest to require one carrier to afford another carrier the use of its terminals.

One of the questions to be determined is whether the public interest requires the granting of complainant's prayer. It should be remembered that the Southern Pacific has free access to the Port Arthur port facilities provided the traffic moves via Beaumont or pays the Beaumont-Port Arthur division. The testimony on behalf of complainant is to the effect that shippers on the Southern Pacific are averse to sending their goods via the two-line route to Port Arthur when one-line routes are available to other ports and that a route via the Port Arthur interchange to the Port Arthur port facilities, though requiring the services of two different carriers, one a line-haul carrier and the other a switching carrier, would not be regarded by shippers in the same adverse light as the route via Beaumont. Also complainant suggests that if the Southern Pacific could reach the Port Arthur port facilities by absorbing a nominal switching charge instead of parting with a substantial portion of the joint through rate, it might send some unrouted traffic via Port Arthur that would otherwise move via New Orleans, Galveston, or Beaumont.

The port facilities at New Orleans, Galveston, and Beaumont are open to all lines on a switching basis and complainant contends that Port Arthur should have the same freedom of opportunity in this respect as its competing ports have. Except as to lumber and timber,

Port Arthur is a one-railroad port, but complainant hopes that if it prevails in this case shippers will regard it as a two-railroad port.

The psychological effect on shippers on the Southern Pacific of a so-called one-line route to Port Arthur is worthy of consideration, but it is not clear that any better service could be had via the Port Arthur interchange than via the Beaumont interchange, or that any great good would accrue to Port Arthur interests or to the general public by reducing the compensation of the Kansas City Southern and increasing to the same extent that of the Southern Pacific. The Southern Pacific took no active part in this case. Naturally that road prefers to foster and develop ports that it has more reason to call its own. At Galveston and Beaumont it reaches the port facilities with its own rails.

The Kansas City Southern has spent large sums in developing its terminal facilities at Port Arthur and is entitled to use them to obtain the maximum amount of revenue that is compatible with reason and the public interest. This road should not be required to afford its facilities to other roads at a nominal compensation, nor should its control of its business be restricted by governmental regulation unless it appears that some compelling public interest would thereby lawfully be served.

The allegations of the complaint have not been sustained and an order of dismissal accordingly will be entered. . . .

QUESTIONS

1. Under what conditions may the Commission order that a terminal be used by a railroad other than the road owning the terminal?

2. What are the differences, so far as the use of terminals is concerned, between the provisions of Section 1, paragraph 15, and Section 3, paragraph 4?

3. Which of the two provisions will more frequently be made use of by the Commission?

4. In the case quoted what conditions would make the Commission open the terminal to the Southern Pacific?

5. The Commission, finding that an emergency exists, issues, without notice or hearing, an order requiring a terminal carrier to switch over its own tracks and by its own engines freight cars tendered by or for another carrier. Is this within the power granted the Commission by the Interstate Commerce Act?

6. The Pennsylvania Railroad has an expensive passenger terminal in New York City. A carrier having a terminal on the New Jersey side of the Hudson

500 GOVERNMENT AND RAILROAD TRANSPORTATION

River applies to the Commission for an order permitting certain of its passenger trains to use the Pennsylvania terminal. Under what conditions will the Commission grant the road's application?

7. Traffic authorities have decided that the only satisfactory method of handling freight in one of the largest cities of the country is by means of completely unified terminal facilities. The railroads concerned have failed to take steps to bring about such unification. What may the Commission do to facilitate it?

3. CONSTRUCTION OR ABANDONMENT OF LINES

[A]

[The pertinent statutory provisions are found in Section 1 of the Interstate Commerce Act, paragraphs 18-22 (I. C. Act, pp. 9-12).]

[B]

Colorado *v.* United States

United States Supreme Court (1926), 271 U.S. 153

MR. JUSTICE BRANDEIS delivered the opinion of the court :

This suit was brought by Colorado against the United States, in the Federal court for that state, to enjoin and set aside, in part, an order of the Interstate Commerce Commission issued February 11, 1924. The order is a certificate that present and future public convenience and necessity permit the abandonment by the Colorado & Southern Railway Company, six months thereafter, of a branch line located wholly in that state. The certificate was issued under Interstate Commerce Act, Section 1, paragraphs 18-20, as amended by Transportation Act, 1920, c. 91, Section 402, 41 Stat. 456, 477.

The company is a Colorado corporation. It owns and operates in intrastate and interstate commerce a railroad system located partly in Colorado and partly in other states. The branch was constructed under the authority of Colorado and was acquired by the company under its authority. The line is narrow gauge. It is now physically detached from other lines of the company ; but it is operated in both intrastate and interstate commerce as a part of the system by means of connections with other railroads. The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation ; that for years operation

of the branch had resulted in large deficits; that future operation would likewise result in large deficits; that the operating results of the branch are reflected in the company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus continued operation would constitute an undue burden upon interstate commerce. *Abandonment of Branch Line by Colorado & Southern Ry.*, 72 I. C. C. 315; 82 I. C. C. 310; 86 I. C. C. 393.

The application for the certificate was filed September 1, 1921. Before any hearing thereon, the state moved that the proceeding be dismissed on the ground, among others, that, as the branch was wholly intrastate, the Commission was without jurisdiction of the application. This objection was overruled. Thereafter, the state opposed, on the merits, the granting of the certificate. The case was first heard before Division 4 of the Commission on exceptions filed by the company to the examiner's proposed report. On July 28, 1922, the application was denied, with leave to renew it "if the improvement in operating results, confidently anticipated by protestants, should not materialize." 72 I. C. C. 315. On May 19, 1923, the company filed a petition praying that the case be reopened and set for further hearing. Division 4 heard it. On September 24, 1923, an order was entered that the certificate issue. 82 I. C. C. 310. A hearing before the full Commission was then sought by the state and the other protestants. Compare *United States v. Abilene & Southern Ry. Co.*, 265 U.S. 274, 281. The request was granted. On February 11, 1924, the order was affirmed with the modification that the certificate should not take effect until six months from that date. 86 I. C. C. 393. The effective date of the certificate was later extended to September 11, 1924; and finally to October 11, 1924. 94 I. C. C. 657, 661.

Meanwhile, this suit had been begun. The Commission and the company intervened as defendants. On August 19, 1924, a decree dismissing the bill on the merits was entered, upon final hearing, without opinion. A motion for a suspension of the order of the Commission pending an appeal was denied. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220. The order is assailed as void in so far as it authorizes abandonment and discontinuance of operation in intrastate traffic. The remedy pursued is the appropriate one. See *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204.

First. The main contention of the state is that the Commission lacks power to authorize the company to abandon, as respects intrastate traffic, a part of its line lying wholly within the state. The argument is

this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a state to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may, therefore, without such consent, abandon all lines within the state. *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396; *Bullock v. Florida*, 254 U.S. 513, 520; *Railroad Commission v. Eastern Texas R.R. Co.*, 264 U.S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the state; *Chesapeake & Ohio Ry. Co. v. Public Service Commission*, 242 U.S. 603; *Fort Smith Light & Traction Co. v. Bourland*, 267 U.S. 330. The charter of the Colorado & Southern is a contract with the state. By accepting the charter, the company assumed the obligation of providing intrastate service on every part of its line within the state, *Colorado & Southern Ry. v. Railroad Commission*, 54 Colo. 64, 92-93. The extent and character of this service are subject to regulation by the state. The inherent power of a state to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an important circumstance bearing upon the reasonableness of the state's order requiring the service. In the case at bar no question of the reasonableness of the state's action can arise, because the state has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the state its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the state from its primary obligation to furnish service. If paragraph 18 of Section 1 should be construed as authorizing the Commission to do so without the consent of the state, the provision would be unconstitutional. Compare *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204, 217. Such is the argument.

The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues, not primarily to protect the railroad, but to protect interstate commerce from undue burdens

or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial position of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstructions or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the state's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the Federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a state establishes intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service (*Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *Nashville, Chattanooga & St. Louis Ry. v. Tennessee*, 262 U.S. 318); or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers (*Railroad Commission v. Southern Pacific Co.*, 264 U.S. 331); or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier (*Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266). The jurisdiction exercised by the Commission in these cases is in essence that which was invoked in the *Shreveport Case*, 234 U.S. 342, a power to prevent unjust preference to particular intrastate shippers

or localities at the demonstrated expense of interstate commerce. But there is a broader basis for Federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co. v. United States*, 222 U.S. 20; *Atlantic Coast Line v. Georgia*, 234 U.S. 280, 293. It expressly excluded from Federal control that part of the railroad which consists of "spur, industrial, team, switching or side tracks located . . . wholly within one state." See *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, *supra*. But as to the rest of every railroad line used in interstate commerce Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by Section 20a over the issuance of securities. Compare *Venner v. Michigan Central R.R. Co.*, 271 U.S. 127. It is the ground on which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry. v. United States*, 263 U.S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194. And upon it rests likewise the power exerted by this court in setting aside the state regulations involved in *Union Pacific R.R. Co. v. Public Service Commission*, 248 U.S. 67, and *St. Louis & San Francisco Ry. Co. v. Public Service Commission*, 254 U.S. 535. . . .

The exercise of Federal power in authorizing abandonment is not an invasion of a field reserved to the state. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the state is subordinate to the per-

formance by it of its Federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission v. Eastern Texas R.R. Co.*, 264 U.S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York v. United States*, 257 U.S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control, but paramount control, in so far as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

Second. The state contends further that the order is void, so far as it relates to intrastate traffic, because essential findings were not made and, also, because essential findings made were not supported by evidence. The *Chicago Junction Case*, 264 U.S. 258. The findings alleged to be essential and lacking are that by continued operation of the branch interstate or foreign commerce will be discriminated against, or that the company will be prevented from earning a fair return on the value of its properties as a whole, or that the entire intrastate business in Colorado will not earn such a return upon the property used in conducting that business. The other objections urged are that the evidence of past operating deficits on the branch, which include both interstate and intrastate traffic, does not support the finding that operation in intrastate traffic alone will result in like deficits; and that the decision of the Commission was improperly influenced by an offer to lease the line to the protestants at a nominal rental. All the evidence before the Commission was introduced below and is, in substance, incorporated in the record on appeal. Both classes of objections must, therefore, be considered. *New England Divisions Case*, 261 U.S. 184, 203.

Before examining the specific objections, the nature of the determination to be made by the Commission upon an application for leave

to abandon should be further considered. As every projected abandonment of any part of a railroad engaged in both interstate and intrastate commerce may conceivably involve a conflict between state and national interests, the consent of the Commission must be obtained by the railroad in every case. To insure due consideration of the local interests, Congress provided that a copy of every application must be promptly filed with the governor of the state directly affected, that notice of the application must be published in some local newspaper, and that the appropriate state authorities should have "the right to make before the Commission such representations as they may deem just and proper for preserving the rights and interests of their people and the states, respectively, involved in such proceedings." In practice, representatives of state regulatory bodies sit, sometimes, with the representatives of the Commission at hearings upon the application for a certificate. Occasionally, the Commission leaves the preliminary inquiry to the state body. And always consideration is given by the Commission to the representations of the state authorities.¹

While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the state, or that it will result in a denial of such compensation for the property within the state used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. . . . The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. Compare Proposed Abandonment by Boston & Maine R.R., 105 I. C. C. 13, 16. The result of this weighing — the judgment of the Commission — is expressed by its order granting or denying the certificate.

¹ Footnotes are omitted.

It is rare that the application for leave to abandon actually involves a conflict between the needs of interstate and of intrastate commerce. In many cases it is clear that the extent of the whole traffic, the degree of dependence of the communities directly affected upon the particular means of transportation, and other attendant conditions, are such that the carrier may not justly be required to continue to bear the financial loss necessarily entailed by operation. In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier. The problem and the process are substantially the same in these cases as where the conflict is between the needs of intrastate and of interstate commerce. Whatever the precise nature of these conflicting needs, the determination is made upon a balancing of the respective interests — the effort being to decide what fairness to all concerned demands. In that balancing, the fact of demonstrated prejudice to interstate commerce and the absence of earnings adequate to afford reasonable compensation are, of course, relevant and may often be controlling. But the act does not make issuance of the certificate dependent upon a specific finding to that effect.

An examination of the extensive record and of the three opinions of the Commission convinces us that no relevant fact was ignored, that there was ample evidence to support the facts found, and that the judgment of the Commission was not improperly influenced by the offer to lease the line to the protestants at a nominal rental. The case at bar is unlike *Texas v. Eastern Texas R.R. Co.*, 258 U.S. 204. There, the railroad was permitted to be relieved only from continuing operations in interstate commerce. It was being operated independently, and not as a branch of any railroad engaged in interstate commerce. Losses incurred in its operation would not be reflected in the accounts of any interstate carrier; and no interstate carrier would have had to make good deficits so incurred. Its continued operation could not burden or prejudice interstate commerce, for the Commission in issuing its certificate had adjudged that public necessity and convenience did not demand the continuance of its interstate services.

Affirmed.

QUESTIONS

1. Is the statute seeking to control construction and abandonment a new departure in railroad regulation?

2. Why should power be given to the Interstate Commerce Commission to prevent the construction of railroads?

3. What will the Commission consider before granting permission to a railroad to commence new construction?

4. A corporation is formed to construct an intrastate railroad. It is contended that the permission of the Commission is necessary before construction is begun. Decide.

5. A railroad subject to the Interstate Commerce Act constructs a branch entirely within the state of Maine. Action is brought against the road for not obtaining the permission of the Commission. Decide.

6. The Illinois Central Railroad Company desires to construct a cut-off. It applies to the Commission for a certificate of convenience and necessity. The state of Illinois objects on the ground that the new line will deprive it of revenue formerly received from a charter tax. Decide.

7. Application is made for permission to construct a new railroad as a terminal and connection road at Detroit. The only possibilities of the line seem to rest in the chance of opening up new industrial development at some distance outside the city. The road's financing is to be based upon securities sold at a large discount. Shall the application be granted?

8. An independent railroad entirely within the boundaries of a single state is in process of construction. Suit is brought to enjoin further work on it on the ground that a certificate of public convenience and necessity has not been obtained from the Commission. Decide.

9. A territory is efficiently and adequately served by a railroad which is capable of handling a much greater volume of traffic. Will the application of another railroad, for permission to build an extension into the territory, be approved?

10. A state railroad commission orders three important railroads, each engaged in interstate commerce, to relocate their tracks and to build a union passenger station. Must the roads obey the state commission's order?

11. A branch of the Boston and Maine Railroad is operated only in the summer and serves a single large hotel. The branch is located entirely within the state of New Hampshire. Passengers comprise its main traffic, and they average two per train. The operating expenses are ten times the operating revenue. The railroad applies to the Commission for permission to abandon the branch. Decide.

12. A railroad has a short branch which has to meet truck and passenger-automobile competition. Two shippers of fish are dependent on the branch

for the quick and economical handling of their freight. The branch is a severe financial loss to the railroad. Application is made for permission to abandon it. Decide.

13. The Commission issues a certificate of public convenience and necessity permitting an independent railroad located entirely within a state to abandon its line. Does this give the road permission to discontinue service in intrastate traffic as well as in interstate traffic?

14. What is the extent of the Commission's right to permit the complete abandonment of the whole or any part of a railroad without the consent of the state or states through which the railroad goes?

15. On what grounds will the Commission grant permission to abandon a line of railroad?

16. Under what conditions may a railroad engaged in both interstate and intrastate commerce abandon a part of its line without the Commission's permission?

4. ESTABLISHMENT OF CONNECTIONS WITH WATER CARRIERS

[A]

[The pertinent statutory provisions are found in Section 6 of the Interstate Commerce Act, paragraph 13 through (a). (I. C. Act, pp. 26-27).]

[B]

United States *v.* New York Central Railroad Company

United States Supreme Court (1926), 272 U.S. 457

MR. JUSTICE STONE delivered the opinion of the court :

The state of New York, by its Superintendent of Public Works, in a complaint filed with the Interstate Commerce Commission, sought to compel the New York Central Railroad Company to provide transportation service between the public terminal of the Erie Barge Canal at Buffalo and shippers located along its tracks and along the lines of other railroads with which it can interchange traffic. The service demanded included the furnishing of rolling stock, motive power, and the placing and removal of cars on the tracks within the terminal, incident to moving traffic between the terminal and appellee's lines. The jurisdiction of the Commission was invoked under Section 6, paragraph 13, of the Interstate Commerce Act as amended by the Panama Canal

Act; August 24, 1912, c. 390, 37 Stat. 568, and Sections 412, 413, Transportation Act; February 28, 1920, c. 91, 41 Stat. 483.

A similar application had been made to the Public Service Commission of New York (Second District). The order of the Commission granting this relief was vacated by the state Supreme Court on the ground that the traffic concerned was interstate in character, jurisdiction over which under the statutes already cited was in the Interstate Commerce Commission. *People ex rel. New York Central R.R. v. Public Service Commission*, 198 App. Div. 436; affirmed without opinion, 232 N. Y. 606.

In the proceedings before the Interstate Commerce Commission, two barge carriers, neither of which had filed rates with it or the Public Service Commission of New York, intervened and were made parties on their petitions setting forth that the interchange of traffic sought to be established by complainant was essential to their business.

After a full hearing the Commission granted the relief sought. *State of New York v. New York Central R.R.*, 95 I. C. C. 119. The railroad company then filed a bill in equity in the district court for northern New York to enjoin the enforcement of the Commission's order. The case was heard on the record of the Interstate Commerce Commission proceedings by the district court, three judges sitting (Urgent Deficiencies Act; October 22, 1913, c. 32, 38 Stat. 220; *Lambert Co. v. Balt. & Ohio R.R.*, 258 U.S. 377), which granted the injunction. 13 Fed. (2d) 200. The case comes here by direct appeal. Urgent Deficiencies Act, *supra*.

The state of New York built, owns and controls the Erie Barge Canal and terminals, wharves and docks used in connection with it, including the Erie Basin terminal at Buffalo. The canal extends eastwardly from Buffalo by a circuitous route to the Hudson River and has several branches. The state does not own barges or rolling stock; nor does it transport merchandise or operate the canal, but it maintains this waterway with its facilities open to free public use. About 75 per cent of the traffic passing over it is interstate.

The Erie Basin terminal, having an area of 9.25 acres, is located on the harbor of Buffalo, adjacent to the right-of-way of the railroad company. It includes two concrete piers with equipment for loading and unloading freight, and five thousand feet of railway track, with sidings, switches and storage tracks. There is a physical connection by switching tracks between the terminal and appellee's lines, which was made in 1919 under a contract between the Director General of

Railroads and the state of New York. The New York Central's main road between Buffalo and New York City parallels the barge canal and serves important points reached by it or its connections. The effect of appellee's refusal to perform the transportation service ordered by the Commission is to preclude the interchange of traffic between rail carriers and barge canal carriers at Buffalo, and incidentally to avoid the diversion to the canal of a substantial amount of traffic now passing over the lines of the railroad company to and from industries located along its right-of-way.

In granting the injunction, the district court disregarded the intervention of the two canal carriers on the ground that they were not shown to be engaged in interstate commerce. Section 6, paragraph 13, of the amended Interstate Commerce Act in so far as it confers authority on the Commission to order the operation of the connecting tracks and to determine the sum to be "paid to or by either carrier" was construed to require the presence of two carriers before the Commission subject to its jurisdiction. It therefore held that the Commission was without jurisdiction to grant the relief sought because there were not two carriers before it, and further, that the complainant, a sovereign state, as owner of the terminal but not a carrier, was beyond its regulatory powers, and presumably could not invoke its jurisdiction.

We lay to one side the question whether the intervenors within the meaning of these acts are carriers of property which "may be or is transported from point to point in the United States . . . not entirely within the limits of a single state." Nor need we consider to what extent, if at all, the state of New York in the event of its failure to maintain its tracks or facilities is beyond the regulatory or coercive power of the Commission as asserted below. Cf. *Georgia v. Chattanooga*, 264 U.S. 472; *Bank of United States v. Planters' Bank*, 9 Wheat. 904, 907.

The jurisdiction of the Commission in this case was properly invoked. A state, when its interests are concerned, as well as a private individual, whether carrier or not, may file a complaint with the Commission. Interstate Commerce Act, Section 13, as amended June 18, 1910, c. 309, 36 Stat. 550. Moreover a complaint is not a prerequisite to the exercise of jurisdiction by the Commission. It may of its own motion investigate and act upon any matter which may be the subject of complaint (with exceptions not now relevant), Section 13, paragraph 2, Interstate Commerce Act, as amended; Panama Canal Act,

supra, at page 568. Hence the only question that need be considered here is the power of the Commission, assuming there was but one carrier before it, to issue the order now attacked.

The Panama Canal Act is by its terms supplemental to the Act to Regulate Commerce, and its obvious purpose was to extend to rail carriers connecting with water carriers in interstate commerce the requirements of Section 1, paragraph 9, of the earlier acts, c. 3591, 34 Stat. 585, 586; c. 309, 36 Stat. 547, for furnishing switching and car service to lateral branch railroads and private sidetracks. By Section 6, paragraph 13, so far as pertinent to the present inquiry, the Commission is given authority to establish physical connection between the lines of the rail carrier and the dock of the water carrier, and to determine and prescribe the terms and conditions upon which the connecting tracks should be operated. It "may either in the construction or operation of such tracks determine what sums shall be paid to or by either carrier."

We may assume, without deciding, that the Commission may not determine the amount to be paid to or by either carrier concerned without having both before it. But the Commission is not required by the terms of the statute to make such a determination and here it did not do so. A determination with respect to construction costs was not necessary since the physical connection had already been established. There could be no need for directing a contribution of operating expenses since the rail carrier was ordered to furnish the entire car service. It was free to establish such rates as it deemed reasonable, subject to review by the Commission if necessary. The only parties concerned in the order actually made were those before the Commission: appellee, which was required to furnish the service, and the state of New York, whose terminal facilities were thus to be used. To have required the presence of one or more canal carriers before the Commission for the purpose of making this order would have been an idle ceremony. The construction of the act contended for is unwarranted by its language and incompatible with its purpose to create an administrative body with authority to facilitate the interchange of interstate traffic between rail and water carriers by a less formal procedure than prevails in courts of law. We conclude that the Commission had authority to make the order and that its findings were supported by the evidence.

We have fully considered other objections to the order but only one is of sufficient moment to require mention. It is argued that the jurisdiction conferred by Section 6, paragraph 13, is limited to interstate

transportation while the order directs transportation of both interstate and intrastate traffic. By the terms of this section the Commission is given jurisdiction both of the transportation described and of the carriers, rail and water, engaged in such transportation. By definition, transportation includes "... all instrumentalities and facilities of shipment or carriage, irrespective of ownership . . . and all services in connection with the receipt, delivery, . . . and transfer in transit, . . . and handling of property transported," Section 1, paragraph 3, Transportation Act, *supra*, at pages 474-475.

The Commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as "the Commission shall have full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated" intended to confer upon the Commission power to regulate the entire stream of commerce. Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. . . . An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce would make compliance with the Commission's orders impossible and defeat the purpose of the act.

Judgment reversed.

MR. JUSTICE SUTHERLAND took no part in the consideration or decision of this case.

QUESTIONS

1. What advantages to shippers will result from the enforcement of the Commission's order?
2. Will the establishment of transportation with the barge-canal terminal injure the railroad?
3. What requirements must be complied with before the Commission will issue an order compelling connection between a carrier by rail and a carrier by water?

4. The Commission establishes a through route and joint rates over rail and water lines. The carrier by water petitions for the establishment of a physical connection between the railroad and its dock. The railroad contends that the joint rates supply all necessary assistance to the water carrier in maintaining service. Under what conditions shall the Commission issue the order that is requested?

5. SWITCH CONNECTIONS

[A]

[The pertinent statutory provisions are contained in Section 1 of the Interstate Commerce Act, paragraph 9 (I. C. Act, pp. 6-7).]

[B]

Cleveland, Cincinnati, Chicago & St. Louis Railway Company *v.* United States

United States Supreme Court (1928), 275 U.S. 404

MR. JUSTICE BRANDEIS delivered the opinion of the court :

... J. K. Dering Coal Company, which owns a large mine located on the Illinois Central Railroad, desired a direct connection also with the railroad commonly known as the Big Four. To this end, it built a private track, about three and a half miles long, from its mine to the right of way of the Big Four. Thereafter, it applied to the Interstate Commerce Commission, under paragraph 9 of Section 1, for an order requiring the Big Four to construct, maintain and operate the desired switch connection. The mine, its track and the proposed connection are wholly within the state of Illinois. Upon full hearing, the Commission found the facts which, under that paragraph, must exist before a shipper can require the railroad to construct a connection. That is, it found that the coal company had built its track up to the right of way of the railroad; that it had made application in writing for the connection; that it had tendered interstate traffic; that the business was sufficient to justify the construction and maintenance of the proposed connection; that the connection is reasonably practicable and can be put in with safety; and that the connection should be constructed and maintained by the railroad. Thereupon, the Commission entered the order prayed for. *J. K. Dering Coal Co. v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 96 I. C. C. 143; 109 I. C. C. 55.

The Big Four brought this suit against the United States and the coal company in the Federal court for northern Illinois to set aside that order. The Commission intervened as defendant. . . .

The district court did not make findings of facts, render an opinion, or indicate by recital in the decree the grounds of its decision. The abridged record occupies 492 printed pages, besides numerous exhibits. There are 21 assignments of error. And the appellant's briefs fill more than 200 pages. No irregularity in the proceedings before the Commission is suggested. It is urged that some essential findings of fact made by the Commission are without support; but the evidence is clearly ample. The claim of invalidity is rested mainly upon contentions of an entirely different nature. These are numerous; and all are groundless. But, because they are peculiar in character and novel, they must be stated in detail.

First. It is contended that the power of the Commission, under paragraph 9, to require the construction of a switch connection with a sidetrack built by a shipper and located wholly within one state, was abrogated by paragraph 22, which added to Section 1 of the Interstate Commerce Act by Transportation Act, 1920. Act of February 28, 1920, c. 91, Section 402, 41 Stat. 456, 478. Paragraph 22 declares: "The authority of the Commission conferred by paragraphs 18 to 21, both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or sidetracks, located or to be located wholly within one state. . . ."

Paragraph 22 in no way affects the power conferred by paragraph 9. By its terms, it operates as a limitation only upon the authority conferred upon the Commission in 1920 by paragraphs 18 to 21. These paragraphs relate to the construction, acquisition, extension and abandonment of a railroad. They deal primarily with rights sought to be exercised by the carrier. . . . In denying their application to sidetracks or spurs, paragraph 22 refers to tracks built by the carrier as a part of its railroad. Compare *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 285, 290. Paragraph 9, on the other hand, relates to switch connections with private sidings built by the shipper. The power to compel such had been granted to the Commission by the act of June 29, 1906, c. 3591, Section 1, 34 Stat. 584, 585. Furthermore, Congress gave explicit proof that in adding paragraph 22 to Section 1, it meant to leave paragraph 9 unaffected. For Transportation Act, 1920, provided specifically that the paragraph concerning switch connections, which as it then stood was unnumbered, should (without

change) be numbered 9. Act of February 28, 1920, c. 91, Section 401, 41 Stat. 456, 475.

Second. It is contended that if the authority given the Commission by paragraph 9 was not abrogated by the enactment of paragraph 22, its exercise in the present case was subject to the requirements of paragraphs 18 to 21, and that the Commission's order is void for non-compliance therewith. The contention has two phases. In the first place, it is said that if the switch connection is made, the sidetrack, by enabling the Big Four to reach into territory hitherto served wholly by another carrier, will become an extension of its lines within the meaning of paragraph 18. . . . This argument proceeds from the same misconception of the purpose of paragraphs 18 to 21 as does the argument discussed above. These paragraphs deal with construction and abandonment on the part of the carrier, not with sidetracks built by the shipper. Furthermore the order gave the Big Four no trackage rights over the coal company's track. The mere fact that a sidetrack with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the track of the shipper, or both combined, an extension of the railroad within the meaning of paragraphs 18 to 21.

The Big Four appears to place greater reliance on the other phase of the contention. The coal company's track crosses at grade, in addition to three highways, the tracks of the Illinois Central and the Southern Illinois. There is an agreement between these carriers and the coal company under which, by means of appropriate switch connections which it is physically possible to make, trains from these other lines could pass over the track, and thus, as is contended, tap territory now tributary to the Big Four. The argument is that because of the possibilities of the use of the track by these other carriers, it is an extension within the meaning of paragraph 18. *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, 270 U.S. 266. But no such connection has been made or attempted or threatened; and neither the Illinois Commerce Commission nor the Interstate Commerce Commission has authorized such connection or use. If the track is used by the Illinois Central or the Southern Illinois in the manner described, paragraph 20 of Section 1 furnishes the appellant with an appropriate remedy. *Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fe Ry. Co.*, *supra*.

Third. It is contended that, regardless of the fact that the order of the Commission provides only for a switch connection with the siding

of the coal company, the siding must be regarded as an extension within the meaning of paragraphs 18 to 21, because under the law of Illinois, all tracks which cross highways are deemed public tracks, and this track crosses highways. It is true that, under Section 45 of the Public Utilities Act of the state, Cahill's Illinois Revised Statutes (1925), Chap. 111a, par. 60, a switch track, though built by an industry and used in connection with it, is a part of the railroad subject to public use. . . . But, obviously, a state cannot, in respect to the regulation of interstate commerce, override the will of Congress. *Napier v. Atlantic Coast Line*, 272 U.S. 605. The Commission was given the authority to compel an interstate carrier to construct a switch connection with a sidetrack built by an industry. The state cannot curtail the Commission's power over interstate commerce by denying it authority to compel a connection with such a sidetrack unless the circumstances are such that public necessity and convenience require an extension of the railroad under paragraphs 18 to 21. Compare *Colorado v. United States*, 271 U.S. 153; *Alabama & Vicksburg Ry. Co. v. Jackson & Eastern Ry. Co.*, 271 U.S. 244. As the Commission said, when making the order: "We, of course, are not concerned with the character of the track with respect to intrastate commerce." 109 I. C. C. 55, 57.

Fourth. It is contended that the coal company is estopped by certain proceedings in the state courts from denying that the track from the mine to the right of way of the Big Four is an extension, within the meaning of paragraphs 18 to 21. The facts relied upon, so far as material, are these. In 1922, the coal company applied to the Illinois Commerce Commission for leave to build this track, and later prayed that its use be limited to a private mine-lead track. The Big Four challenged the Commission's jurisdiction, on the ground that the proceeding was one to compel the connection or extension of interstate carriers and was within the exclusive control of the Interstate Commerce Commission. The Illinois Commerce Commission overruled the challenge, found for the petitioners on the merits, and, at their request, provided in its orders that the track when built and connected with the Big Four should not be used for any other purpose than to serve the mine of the coal company, until permission for further use should be granted by the Illinois Commission. Thereupon, the Big Four assailed the orders of the state commission in the circuit court for Saline County and was defeated there. After the validity of the orders had been affirmed by that court the track was constructed. Later, the

Supreme Court of the state, reviewing the circuit court's decision, held the order of the state commission void, on the ground, urged by the Big Four, that, in spite of the limitation in the orders, the track would be, under the law of Illinois, a public track, and hence an extension of the railroads within the meaning of paragraphs 18 to 21; and that since the carrier was engaged in interstate commerce, the jurisdiction to compel construction of the switch vested in the Interstate Commerce Commission, *C., C., C. & St. L. Ry. Co. v. Commerce Commission*, 315 Ill. 461, 476. That court said:

This section [45 of the Utilities Act of the state] cannot be held to apply to situations coming under the Federal Transportation Act. As to such the latter act is supreme. Nor can it be said that the legislature in enacting Section 45 sought to confer on the Illinois Commerce Commission jurisdiction of those matters coming under the Federal Transportation Act. The steam railways involved here are interstate carriers. That which amounts to an extension of their lines is under the sole jurisdiction of the Interstate Commerce Commission, and the Illinois Commerce Commission is without jurisdiction.

The Big Four, having, thus, convinced the state court that the order of the state commission was void because the matter is one within the jurisdiction of the Federal Commission, insists now that the latter cannot act because of the state decision. The judgment of the highest court of the state is, of course, conclusive in so far as it declares that the state commission exceeded its statutory powers. But, obviously, neither the legislature nor the courts of a state can limit the power of the Interstate Commerce Commission to compel connections with private sidetracks. The declaration of the state court that the track which the Federal authority determines is private, shall be deemed public, cannot affect the validity of the order of the Interstate Commerce Commission. If it could, construction by the railroad of the switch connection with the shipper's track would not be compellable under either state or Federal law. Compare *United States v. New York Central R.R. Co.*, 272 U.S. 457, 459.

Fifth. It is contended that the coal company is not, within the meaning of paragraph 9, a "shipper" on the Big Four, because its mine was already connected with the Illinois Central. The argument is that Congress did not intend to give a shipper the right to a direct connection with more than one railroad. There is nothing in the Interstate Commerce Act which justifies such a limitation of the general language of paragraph 9. Coal mines are often connected with more than one railroad. . . .

Sixth. It is contended that the coal company is not a shipper on the Big Four, within the meaning of paragraph 9, because up to the time of the application to the Commission it had not actually shipped coal by this route over the Big Four. The argument is that no one, unless he is already a shipper at the time of the application to the Commission, is entitled to a switch connection. Congress imposed no such limitation. It safeguarded the expenditures of the carrier by other provisions. It limited the railroad's obligation to the building of the switch connection, leaving the burden of building the sidetrack upon the shipper. . . . And the railroad cannot be ordered to build the switch until after the shipper has built the private siding. . . .

Thus, all the contentions of the Big Four are clearly unfounded. The district court properly refused to grant a stay of the Commission's order pending an appeal. . . .

Affirmed.

QUESTIONS

1. Why should the Commission have power to order a railroad to make switch connections?

2. On what legitimate grounds might a railroad refuse such connections?

3. A state railroad commission orders that a switching connection be made by the A railroad with an industry shipping a large volume of freight. The state law seems to justify the order, but the railroad contends in the Federal courts that it is *ultra vires*. Decide.

4. What is the difference between a switch connection and an extension?

5. What different principles govern the Interstate Commerce Commission's orders relating to switch connections and extensions?

6. The Interstate Commerce Commission orders the B railroad to construct a switch and sidetrack to connect with an industry shipping on the average two carloads of freight per week. The railroad contends that the Commission's order is invalid. Decide.

L. REGULATION OF MONOPOLISTIC TENDENCY IN RAILROADS

[The general provisions of the Federal antitrust acts apply, with exceptions to be mentioned in the course of this section, to railroads as they do to other types of business enterprise. No attempt can be made here to consider the effects of these acts on railroads except in so far as special provisions have been made to apply to them or as the function of transportation has created special conditions that have given rise to antitrust action; in other words, an action against a

railroad which does not differ in any essential from an action which might be brought against a manufacturing corporation under the antitrust acts is not dealt with in this section.]

1. POOLING

a. INTERSTATE COMMERCE ACT OF 1887

[A¹]

SECTION 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

[B]

In Re Pooling Freights

District Court, Tennessee Western Division (1902), 115 Fed. 588.

HAMMOND, J.

... The word "pool" is defined in the Century Dictionary as follows:

Pool (noun): A combination intended by concert of action to make or control changes in market rates. . . . A combination of the interests of several otherwise competing parties, such as rival transportation lines, in which all take common ground as regards the public, and distribute the profits of the business among themselves equally or according to special agreement. In this sense pooling is a system of reconciling conflicting interests, and of obviating ruinous competition, by which the several competing parties or companies throw their revenue into one common fund, which is then divided or redistributed among the members of the pool on a basis of percentages or proportions previously agreed upon or determined by arbitration.

Pool (verb): To put into one common fund or stock for the purpose of dividing or redistributing in certain proportions; make into a common fund; as, to *pool* interests.

EXAMPLE. The common method of accomplishing this [dividing the tariff between competing lines] is to pool the receipts, and to redistribute them on percentages based upon experience and decided by an arbitrator.

¹ Section 5 of the Act to Regulate Commerce of February 4, 1887, 24 Stat. L. 379.

The statute contemplates two methods of pooling, both of which are prohibited: First, a physical pool, which means a distribution by the carriers of property offered for transportation among different and competing railroads in proportions and on percentages previously agreed upon; and, secondly, a money pool, which is described best in the language of the statute, "to divide between them (different and competing railroads) the aggregate or net proceeds of the earnings of such railroads, or any portion thereof." By the language "any common carrier subject to the provisions of this act," as employed in Section 5, *supra*, is meant any railroad engaged in the transportation of passengers or property from one state or territory of the United States or the District of Columbia to another state or territory of the United States or the District of Columbia. Traffic carried only within the territorial limits of a state is not interstate in character, and the instrumentality of its transportation is not subject to the provisions of the statute with respect to such traffic. If, from the evidence of witnesses the district attorney brings before your body, you find there is probable cause for believing that there exists within the jurisdiction of this court an agreement whereby traffic is or has been within the statutory period of two years divided by and among different and competing lines of railroad, no matter in what proportions, then it will be your duty to return indictments against those who you have reason to believe are probably guilty. The statute provides for the indictment not only of the carrier itself, but also of the officers individually, where the carrier is a corporation, so that in such cases both are indictable. The agreement for the division of traffic need not necessarily be reduced to writing in order to constitute an offense. Any arrangement, oral or otherwise, or combination, which has for its purpose and eventuates in the pooling of freights of different and competing railroads, comes within the inhibition of the Act to Regulate Commerce. . . .

QUESTIONS

1. Thirty-two carriers contract to maintain rates. Is such action a violation of Section 5?
2. At the time of the Pan-American Exposition the railroads made special arrangements granting reduced rates to Buffalo and providing that earnings on this special traffic should be shared on an agreed basis. Was such an arrangement legal?

522 GOVERNMENT AND RAILROAD TRANSPORTATION

3. The immigrant traffic was divided among the carriers by the Western Passenger Association in a proportion based on the amount of passenger traffic handled by each. Did such an agreement constitute illegal pooling?

4. To prevent the giving of rebates in violation of the Act to Regulate Commerce, two roads adopt a pooling agreement. Is this action legal?

5. Carriers in one section of the country agree to make rates in such a manner that traffic from certain sections will be given to designated roads. A fine is charged if the agreement is violated, and the proceeds are paid to the injured road. It is charged that this constitutes a pooling agreement. Decide.

6. Freight shipped from the United States to ports on the Baltic Sea is divided among ocean carriers according to a prearranged plan. Is this in violation of Section 5 of the Act to Regulate Commerce?

b. TRANSPORTATION ACT

[A]

[The pertinent statutory provisions are found in Section 5 of the Interstate Commerce Act, paragraphs 1, 3, and 8 (I. C. Act, pp. 17-18, 20).]

[B]

Puget Sound-Portland Joint Passenger-Train Service

Interstate Commerce Commission (1925), 96 I. C. C. 116

AITCHISON, *Chairman* :

Upon application of the Northern Pacific Railway Company, Great Northern Railway Company, and Oregon-Washington Railroad & Navigation Company, hereinafter called the applicants, for our approval, under paragraph (1) of Section 5 of the Interstate Commerce Act, of a certain contract which provides for the establishment of a joint passenger-train service between Seattle (Washington), Tacoma (Washington), and Portland (Oregon), and for a division of earnings therefrom, we instituted an investigation into the matter. A copy of our order and of the application was served upon the governors of Washington and Oregon and upon the tribunals in these states having regulatory powers over common carriers. A hearing has been had, and all the carriers involved assent to the division of earnings in the manner and under the terms proposed.

The Northern Pacific Railway Company owns and operates a

railroad between Seattle, Tacoma, and Portland. Between Tacoma and Tenino, Washington, it has two lines, one called the Prairie line and the other the Point Defiance line. The Great Northern Railway Company has trackage rights over this railroad, with the exception of the Point Defiance line, under an agreement which grants to the Great Northern for a period of 999 years equal joint possession and use in common with the Northern Pacific Railway Company and such others as it may admit thereto. The Oregon-Washington Railroad & Navigation Company also has trackage rights over the railroad of the Northern Pacific Railway Company between Tacoma and Portland, with the exception of the Prairie line, under an agreement similar to that of the Great Northern. Between Seattle and Tacoma the Oregon-Washington Railroad & Navigation Company operates a line of railroad, part of which is wholly owned by it and part of which is jointly owned with the Chicago, Milwaukee & St. Paul Railway Company.

Applicants are engaged in the transportation of passengers by railroad between the cities referred to, and points intermediate thereto, in competition with each other, with the Chicago, Milwaukee & St. Paul Railway Company, and with the Seattle & Tacoma Interurban Railway Company, as well as with motor-bus lines.

Originally the Northern Pacific was the only railroad which operated between Portland and the Washington points named. At that time it operated four passenger trains in each direction daily. Operations under the trackage agreements above referred to began in 1910, when four trains per day in each direction were added by the Oregon-Washington Railroad & Navigation Company, and three trains each way daily by the Great Northern. As a result there were eleven passenger trains in each direction daily between Portland and Puget Sound points. About two years later the service was reduced to nine trains daily in each direction, and during the war it was further reduced to six trains in each direction daily. That is the number now operated. Because of the inroads made upon applicants' passenger business by bus lines and other competition, passenger revenues have gradually declined from year to year.

There has been no complaint by the public as to the reduction in the number of trains, but there has been and is considerable dissatisfaction because there are no fast trains or trains limited as to stops. The running time of present trains, except the slower night trains, is 6 hours 40 minutes. Commercial organizations and others in Portland, Tacoma, and Seattle have been endeavoring for several years to

obtain a fast-train service between the points named, but without results. Each carrier recognized that if it put on a fast train the others would likewise do so. The available traffic would not warrant this, and the result would be a waste of transportation, since the service furnished would be greatly in excess of the needs of the traveling public. Various plans were devised by the applicants in an effort to overcome the difficulties that were encountered, but there were insurmountable objections to all of them. Finally because of the insistence of the public served, applicants decided that the most reasonable and economical thing to be done under the circumstances was to pool the earnings of all of the Portland-Tacoma-Seattle passenger trains and to operate them as a joint effort. The contract which we are asked to approve would carry into effect that plan.

The contract provides for the operation of five trains in each direction daily between Seattle and Portland, one of such trains to be limited as to stops and upon a fast schedule. There is also provision for a local passenger train in each direction daily between Centralia, Washington, and Portland. The same tracks, stations, and appurtenant facilities as are now in use will continue to be used by the pool trains. Special trains which are run specifically for handling traffic local to the lines between Seattle and Portland are considered as pool trains. If a train originates at, or is destined to, a point beyond Seattle or Portland it will not be included in the pool account, nor, generally speaking, will trains be included which operate only in part on the tracks hereinbefore described.

Pool revenue is defined in the contract to be revenue derived from freight handled in passenger trains, passenger fares, surcharge, excess baggage, parlor and chair car fares, United States mail, milk, express, newspaper, and from all other passenger-train service, except revenue derived from dining and buffet service and Pullman Company contracts. In the case of traffic originating at points served by the pool trains destined for beyond, or originating at points beyond but destined to points served by the pool trains, or originating at and destined to points not served by the pool trains, but passing over all or a part of the pool tracks, the revenue will be allocated on the bases of established divisions, mileage prorate, or other similar methods which are detailed. With the exception of express revenue derived from less-than-carload shipments, and revenue from milk and newspapers, the pool gross revenues will be divided among the carriers on the basis of the percentages which the gross revenues earned by each carrier in

1923 from its Portland-Seattle passenger trains bore to the total gross revenue earned by all, and each carrier shall be entitled to receive from the revenues which accrue from the operation of the pool service the percentage of revenue in the various accounts which it received during the corresponding month of 1923, which is taken as a test period. The average of the last three months of 1924 is used as a test period for the division of revenue from express less-than-carload shipments, milk, and newspapers. . . .

Equipment to be furnished by the respective carriers is also based on the year 1923 as a test period. The carriers have agreed to equalize expenses of operating the pool trains and charges for maintenance, so that each carrier shall sustain the same percentage of the aggregate of such expenses as it paid for the corresponding month in 1923.

The contract is to continue in effect for a period of two years from its effective date.

The operation of passenger trains between Portland and Puget Sound points as a joint effort will enable carriers to arrange their schedules so as to result in greater convenience to the public. In addition to the fast train, it will also be possible to operate the other trains on a somewhat shorter time schedule than is now done. The proposed schedule of pool trains will result in a saving of approximately 1632 passenger car-miles per day, or 595,680 passenger car-miles per year. In reality the economy that will result is much greater. As has been indicated, the alternative of a pooling of operations and the putting on of one fast train is the establishment of such service by each of the three carriers. By the pooling plan and division of earnings proposed will result the much greater saving of train-miles and car-miles incident to the operation of two trains in each direction daily.

While the pooling arrangement will of necessity lessen the competition of carriers for traffic between points local to the tracks hereinbefore described, there will remain the same incentive for each carrier to strive for through business as now exists, because only the portion of the traffic which travels over the pool tracks will be subject to division of earnings. Nor will there be likelihood of any carrier furnishing shabby equipment for the pool operations, because to do so would undoubtedly reflect to its disadvantage at other points not included in the pool.

Representatives of civic and other interests which will be affected by the passenger-train service under the proposed contract, and officials of the rate regulatory bodies of the two states traversed, appeared at the hearing in support of the plan.

We find that the proposed division of earnings between the Northern Pacific Railway Company, Great Northern Railway Company, and Oregon-Washington Railroad & Navigation Company will be in the interest of better service to the public, will promote economy of operation, and will not unduly restrain competition, and that the terms and conditions under which such division is proposed to be made are just and reasonable. We will enter an order approving the proposed contract for the future, reserving the right to modify such approval by imposing additional or different terms as a condition of its continuance, or to revoke it entirely if in the future that course seems proper.

QUESTIONS

1. How does the amendment of 1920 alter the original provisions concerning pooling?

2. What would be the procedure followed by two roads desiring to enter into a pooling agreement?

3. What precedent is there for the partial exemption of carriers from the provisions of the "antitrust laws"?

4. What definite economic grounds might be urged to justify pooling among carriers?

5. What advantages will arise from the pooling agreement described in the Puget Sound-Portland case? Are these advantages enjoyed mainly by the stockholders of the roads or by the general public?

6. A pooling arrangement proposed by two railroads running between Minneapolis, Minnesota, and Superior, Wisconsin, involves the discontinuance of all late night service on one of the lines. The train which has been performing this service has averaged from fourteen to eighteen passengers per trip to and from local points in Wisconsin. Shall the arrangement be approved, assuming that other features are satisfactory?

7. Two railroads propose to enter into a pooling agreement between two important cities. A third road with a line between the two cities urges that it be included in the agreement. The other roads claim that because of its roundabout route it is not a competitor. Shall the agreement between the two roads be approved?

8. A nation-wide coal strike has suspended production for some months. When work is resumed, the Interstate Commerce Commission orders that the carriage of anthracite coal to New England be divided in equal proportions between two carriers. What procedure would the Commission follow and what justification would it have in making such an order?

9. What conditions must exist before the Commission will be willing to sanction a pooling agreement?

2. PURCHASE OF STOCK OR LEASING OF ONE RAILROAD BY ANOTHER

[A]

[Pertinent statutory provisions are found in Section 5 of the Interstate Commerce Act, paragraphs 2, 3, and 8 (I. C. Act, pp. 17-18, 20). Attention should also be called to paragraphs 4-7 of Section 5. These are considered in detail in *M*, *infra*, but they should be kept in mind in the study of this section. As has been suggested above, the general prohibitions of Section 7 of the Clayton Antitrust Act apply to railroads just as they do to other corporations. A portion of that section which especially applies to railroads is quoted in I. C. Act, p. 142.]

[B]

Control of Central Pacific by Southern Pacific

Interstate Commerce Commission (1923), 76 I. C. C. 508

BY THE COMMISSION :

In this proceeding the Southern Pacific Company applies for authority under paragraph (2) of Section 5 of the Interstate Commerce Act to acquire control by lease and stock ownership of the Central Pacific Railway Company, a copy of the proposed lease being filed with the application. The application recites that the occasion therefor is a recent decision of the Supreme Court of the United States holding that the existing control by the applicant of the Central is prohibited by the Federal antitrust act of July 2, 1890, known as the Sherman law. This decision was rendered on May 29, 1922, in a cause entitled *United States v. Southern Pacific Company et al.*, 259 U.S. 214. The court directed that a decree be entered terminating the existing control and separating the properties united thereunder, subject to provisions for apportionment or joint use of certain of the lines of the respective companies to which more particular reference will be hereinafter made. The suit in which this decision was rendered was instituted in February, 1914. The issues were joined, the case tried, and the record closed before the passage of the Transportation Act, 1920. That act was not mentioned in the decision of the Supreme Court.

The theory of the application is that Section 407 of the Transportation Act, 1920, amending Section 5 of the Interstate Commerce Act,

contains a grant of authority from Congress to us to permit the acquisition of control of one carrier by another, by lease, stock ownership, or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, whenever found by us to be in the public interest, and expressly relieves carriers acting under such permission from the restrictions of the Sherman law and from any and all other restraints or prohibitions by law, state or Federal. It is urged that these provisions constitute a radical change in the legislative policy of Congress, in respect of the application of the Sherman law to the railroads of the country, and that they evidence a recognition on the part of Congress of the fact that the comprehensive regulation and control of interstate carriers now vested in us renders unnecessary, for the protection of the public, the strict and inflexible application to such carriers of the prohibitions of the Sherman law and similar laws. It is contended further that there may be combinations of railroads that are in the public interest, which are legally impossible under existing antitrust legislation, and that Congress intended to afford a means of permitting or rendering lawful a control or combination of railroads, whenever in our opinion such control or combination is in the public interest.

Approaching the situation from this standpoint, the applicant urges that the decision of the Supreme Court does not in any way preclude us from the exercise of the powers and the performance of the duties conferred or imposed by the Transportation Act. The applicant states further that it is its purpose to acquire *lawful* control of the Central under the later law, to the extent deemed by us to be in the public interest, to the end that the relations between the applicant and the Central may be brought into harmony with the existing policy of the law.

On October 25, 1922, the Union Pacific Railroad Company filed a petition in intervention and moved for the dismissal of the application upon various grounds which will be discussed in the course of this report. Argument was heard upon this motion on November 4, 1922. We thereafter denied the motion and directed that a hearing be held upon the application, leaving the questions raised by the motion for such disposition as might be proper in connection with our disposition of the case upon its merits.

The application sets forth various matters of fact, and evidence was adduced at the hearing in support thereof. The position taken by the applicant may be stated as follows :

The applicant is a Kentucky corporation organized in 1884, which

operates a large system of rail and steamship lines, including the rail lines of the Central Pacific. The present Central Pacific Company is a Utah corporation organized in 1899, which acquired in that year all of the property of the Central Pacific *Railroad* Company. The company last mentioned was organized in 1861 under the laws of California. By 1870 it owned and operated a line from Oakland, California, via Sacramento, California, to Ogden, Utah, and in addition certain north-and-south lines in California, which as early as 1873 reached Goshen Junction in the South and Redding in the North. In 1870 the individuals in control of the Central Pacific acquired control also of the Southern Pacific *Railroad* Company. At this time the Southern Pacific line extended only from San Francisco, California, southward to Gilroy, California. Additional construction by both companies continued throughout the next decade, and as lines were completed they were operated by the Central Pacific until 1885. In February of that year the Southern Pacific *Company*, the applicant in this proceeding, then recently organized, acquired control by lease of the Central Pacific lines. The new Southern Pacific Company in due time acquired the stocks of all the companies comprising the Southern Pacific system as now constituted, including the stock of the present Central Pacific Railway Company, to which the old Central Pacific *Railroad* Company had transferred all of its property as before stated.

The applicant emphasizes the long-continued relationship between the two properties and the resultant interdependent character of the transportation service afforded. It is represented that independent operation would result in the creation of approximately twenty new junction points, that division terminals, shops, and other facilities would be dislocated, and that necessary duplication of facilities would involve large expenditures. Testimony was offered indicating that independent operation would impair the efficiency of the service now offered by both companies and would lead to the disruption of established freight and passenger-train service, thus destroying existing routes and channels of trade. Increases in operating expenses, and the substitution of two- and three-line hauls for one-line hauls, in respect of a substantial volume of traffic, were cited as a reason for the conclusion that a separation of the two systems would bring about a material increase of transportation charges. It was established that the applicant is the guarantor of outstanding funded obligations of the Central Pacific amounting to \$163,237,841.50, and that the applicant has outstanding collateral trust bonds amounting to \$34,100,500,

secured by the pledge of \$84,675,500, virtually all of the outstanding capital stock of the Central Pacific. In addition to the guaranty, the Southern Pacific was shown to have pledged as security for Central Pacific obligations \$54,193,250, appraised value, of stock, and \$6,178,000, appraised value, of bonds of various companies constituting the Southern Pacific system, and that other securities have been pledged for the same purpose which have not been appraised but which are estimated to be of great value. This interrelation of obligations and the provisions of the various indentures of mortgage and pledge executed in connection therewith would result, in the opinion of the applicant, in numerous perplexing and difficult problems if the two companies were separated, involving the rights of the holders of the obligations as well as the rights and obligations of the applicant and the Central as between themselves. Evidence was offered which tends to show that an independent Central Pacific would have difficulty in financing its capital requirements. An analysis of traffic was submitted which purports to show the maximum amount of tonnage which may be claimed to have been diverted in 1921 from the Ogden gateway by reason of Southern Pacific control. The amount thus shown was 82,663 tons, or approximately 0.74 of 1 per cent of the total Central Pacific tonnage, and 0.34 of 1 per cent of the tonnage of all Southern Pacific lines west of El Paso, Texas, and Ogden. It was testified that 75 per cent of all freight traffic and 88 per cent of all passenger traffic on the Central Pacific lines have both origin and destination west of El Paso and Ogden. Testimony was offered as to increase in tonnage handled by the Panama Canal steamship lines for the purpose of showing that such competition has altered the relative importance of the southern route of the Southern Pacific as a competitor of the Ogden route.

The Railroad Commission of California, the state of Utah by its governor and attorney-general, the state of Nevada by its governor and public service commission, the Arizona Corporation Commission, and many trade and civic bodies and chambers of commerce from localities served by the present unified system, intervened in support of the application. Evidence was presented on their behalf, the trend of which was to show that many difficulties and problems would result from a separation of the systems to the prejudice of the particular interests represented.

The interest of employees of the Southern Pacific system was represented by the intervention of the four national train brotherhoods

and the Order of Railway Telegraphers. These offered testimony tending to show that dismemberment would interfere with seniority rights and, by reason of dislocation of runs and positions, would harmfully affect the employees who had established their homes in localities affected. It was urged, further, that the present practice of shifting employees seasonally from the Southern Pacific to the Central Pacific lines, which permits continuity of employment to junior employees, would probably no longer continue.

The Union Pacific Railroad Company alleges an interest in the matter by reason of the fact that its line from the east to Ogden forms with the railroad owned by the Central Pacific Railway Company a through transportation route between the Missouri River and San Francisco and other California points. Under the acts of Congress of July 1, 1862, and July 2, 1864, and acts amendatory thereof and supplementary thereto, commonly known as the Pacific Railroad acts, these lines are required to be operated and used for all purposes of communication, travel, and transportation, so far as the public and government are concerned, and as one connected continuous line, and must afford to each other equal advantages and facilities as to rates, time, and transportation, without discrimination of any kind in favor of or against the road or business of either, and are also authorized to consolidate with each other. Evidence was offered tending to show that, by reason of the competitive interest of its southern route, the Southern Pacific Company had countenanced practices which were prejudicial to the Ogden route, and it is urged that, since the primary interest of the applicant is in the former, by reason of the longer haul, the requirements of the Pacific Railroad acts cannot be fulfilled unless the Ogden route is freed from Southern Pacific domination and control. Considerable testimony was offered for the purpose of showing that present routes afforded by the combined Southern Pacific-Central Pacific system can be maintained by apportionment or provision for joint use of various lines comprehended within the system. Evidence was also offered to show that an independent Central Pacific Railroad Company would be financially self-sustaining.

The Western Pacific Railroad Company intervened, alleging an interest by reason of its competitive line from Salt Lake City, Utah, to San Francisco Bay, and requesting that if the Commission should approve the proposed acquisition of control, a condition be attached to the order requiring the Southern Pacific to enter into arrangements for additional through routes and joint rates with the intervener. . . .

The hearing held upon the application extended over several weeks, and a voluminous record has been made. The salient features thereof have already been outlined. It may be taken as established that the Central Pacific Railway between San Francisco and Ogden, and the Union Pacific Railroad between Ogden and Omaha, Nebraska, and Kansas City, Missouri, with the eastern connections of the latter road, form a system of transportation which affords the most direct and normal route for a large volume of traffic between the East and the West. The same may be said also for the southern route over the Southern Pacific lines. In contrast, the Southern Pacific and Central Pacific lines running north and south in California and Oregon with their branches afford, generally speaking, a service of an essentially different character, consisting of heavy local passenger and freight service and the gathering and delivery of freight for the transcontinental carriers with which such lines connect. The latter element of the service thus performed is as valuable and necessary in the maintenance of present standards of service on the Ogden route as it is to the southern route. From this point of view, the use by the Central under unified management of Southern Pacific lines for gathering and delivery of freight is as important to the Central as the corresponding use made by the Southern of Central lines is to the Southern.

The record justifies the conclusion that separate operation of the Central Pacific lines will disrupt existing routes and service in California and between that state and adjacent states, and except to the extent that the rupture may be mitigated by apportionment of particular lines and provision for the joint or coördinated use of others by the respective carriers, will render impossible the continuance of much valuable transportation service now conducted over the Central Pacific and Southern Pacific lines without regard to corporate ownership. Such separation will result to an indeterminate extent in increased cost of operation and duplication of capital investment in railroad facilities and increased cost of transportation. Moreover, it is doubtful whether for a time at least the Central Pacific, if operated as an independent carrier, would have the earning capacity, credit, and financial ability to sustain the heavy burden of its fixed charges and provide the new capital for its equipment and improvement necessary in the future to meet the requirements of the public service. Indeed there are reasons for grave doubt whether the interests of the country as a whole would not be adversely affected by the financial problems and results consequent upon such a separation. There is a

large volume of traffic having origin or destination on rails controlled by the Southern Pacific Company in central and northern California, not reached by rails of the Central Pacific, and originating in or destined to territory in the East or Middle West, for which the shortest and most economical transportation route is the Central Pacific-Union Pacific route via Ogden. As a practical matter, and in the absence of joint rates or joint use of the lines now existing, access to such points of origin or destination in California can be had by the Central Pacific only by construction of branches and extensions at very great cost, which would involve a wasteful duplication of railroad facilities. To the extent that such traffic might, in the event of a separation of the Central Pacific and Southern Pacific, be secured by the Southern Pacific for transportation over the southerly routes via El Paso in which it participates, the distance, time, and cost would be greater than via the Ogden route, with attendant prejudice to the public interest. On the other hand, the routing of such traffic over the Central Pacific-Union Pacific route via Ogden will be in the interest of those lines, which were created by Federal authority and Federal aid, and will be in accord with the purposes of the Pacific Railroad acts.

It remains to be considered whether these evils can be lessened or removed altogether by the apportionment of particular lines to one carrier or the other, or by providing for the joint or common use of lines strategically located. In the decision of the Supreme Court to which reference has been made it is directed that the decree severing the present control shall provide for such apportionment, or the joint or common use, of the several terminal lines and cut-offs leading to San Francisco Bay which have been constructed or acquired during the unified control of the two systems, to the end that both companies may have such full, convenient, and ready access to the bay and to terminal facilities thereon that each company will be able freely to compete with the other, to serve the public efficiently, and to accomplish the purpose of the legislation under which it was constructed. A like course was directed with respect to the lines extending from San Francisco Bay to Sacramento and to Portland. The decree accomplishing this purpose has not been entered, but we have considered the various ways in which the directions of the Supreme Court might be effected. We entertain no doubt that such arrangement would be practicable, and we are of the opinion that if the two companies entered fairly into the spirit of the Supreme Court's mandate, many of the disadvantages to which we have alluded as arising out of separation

would be eliminated or mitigated. On the whole, however, we are convinced that even if everything of this nature which can be done were done, the result would be more expensive and less efficient and satisfactory service than can be rendered under unified control. The two systems would be weakened both financially and from the standpoint of service. In the course of time this situation might find partial remedy, but in many respects no remedy would be possible.

We are thus brought to the consideration of whether it is possible to authorize the proposed acquisition of control subject to conditions which will remove the opportunity otherwise existing in the Southern Pacific to restrict competition or fetter the free and normal flow of interstate traffic by reason of its control of two competing trans-continental routes, and will adequately protect the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts. On January 3, 1923, before arriving at any conclusion, on suggestion to us by parties before us, we sent a memorandum to persons who had intervened or filed appearances in the proceeding, requesting that expressions be made regarding the arrangement to be sanctioned and required in case the decision of the Commission should be favorable to the applicant's proposal, and asking for specific consideration of the effect of an order of approval made subject to the following conditions :

First. The Southern Pacific shall join with the Union Pacific in maintaining via the lines of said companies between Omaha, Nebraska, and San Francisco Bay points as parts of one connected continuous line through passenger, mail, express, and freight train service between San Francisco or Oakland, California, and Chicago, Illinois, at least equal in every respect to that afforded by either with its connections between Los Angeles, California, or Portland, Oregon, and Chicago, Illinois.

Second. The Southern Pacific shall join with the Union Pacific in maintaining via the lines of said companies between Roseville, California, and Omaha, Nebraska, as parts of one connected continuous line, perishable-freight train service from Roseville, California, to Chicago, Illinois, at least equal in point of time to that afforded by either with its connections from San Bernardino or Colton, California, to Chicago, Illinois.

Third. The Southern Pacific shall coöperate with the Union Pacific in the maintenance of train schedules under which neither shall discriminate as to time or service against the other in favor of any other connection through Ogden or Salt Lake City.

Fourth. The Southern Pacific shall, at the request of the Union Pacific, provide for the publication and maintenance of rates via the Central Pacific through Ogden between all Southern Pacific and Central Pacific points in California west of Banning, and Oregon on the one hand, and Colorado common points and points east thereof on the other, no higher than apply concurrently between the same points via any other route in which it participates. While the Commission may have no power to impose any conditions upon the Union Pacific in this proceeding, it is suggested that the same course should be pursued by the Union Pacific in connection with rates between the same points via its various routes.

Fifth. The Southern Pacific shall coöperate with the Union Pacific to secure by active solicitation the routing of the maximum of freight traffic via Union Pacific and Central Pacific lines through the Missouri River and Ogden as parts of one connected continuous line between all points in California, north of and including Caliente, and Santa Margarita (including points in Oregon on the Klamath Falls Branch, Kirk and south) on the one hand, and points north and west of a line along the northern boundaries of Oklahoma and Arkansas to the Mississippi River, thence via the Mississippi and Ohio rivers (but not including intermediate cities on the Ohio River) to Wheeling, West Virginia, thence north on a line drawn just east of Pittsburgh and Buffalo to Niagara Falls.

We have received replies from practically all of the interveners. The vast majority, including state commissions or other authorities of Arizona, California, Colorado, Nebraska, Nevada, Utah, and Wyoming, were distinctly favorable to an order of approval upon the conditions suggested. Many interveners who had previously objected strenuously to the granting of the application regarded the conditions as sufficiently safeguarding their interests. . . .

The Southern Pacific has stated as its position that it will accept and abide by the five conditions set forth in our memorandum of January 3, 1923, if included in our order. The Union Pacific has approved of the conditions and expressed its view that the same will secure adequately the rights claimed by it under the Pacific Railroad acts. . . .

By virtue of the Pacific Railroad acts the Union Pacific and Central Pacific have certain reciprocal rights, including the right to coöperation in the establishment and maintenance via the Central Pacific-Union Pacific route of through train service and joint rates reasonably necessary to meet competition by other routes, and to coöperation in

other respects, to the end that the lines of said companies shall be operated and used as one connected, continuous line. We think that the rights of the Union Pacific and all interests of the public under the Pacific Railroad acts may be protected by imposing upon the acquisition and exercise of control by the Southern Pacific Company of the Central Pacific the five conditions set out above. We think also that these conditions will so correct and remove any suppression of the normal flow of traffic over the Ogden route that the public interest generally will adequately be protected ; and that they will bring about, in connection with transcontinental traffic, a situation as favorable to the public from a traffic and service standpoint as though the Central Pacific were to remain free from Southern Pacific control. The acquisition of control as proposed, subject to these conditions, will also prevent the evils already adverted to, as incident to separation.

The extent of the control asked by the Southern Pacific Company of the Central Pacific Railway Company in the application is as follows : (a) By lease until December 31, 1984, subject to termination by our order if and when found by us to interfere with the consummation of the final plan of consolidation when promulgated under Section 5 of the Interstate Commerce Act as amended ; and (b) by ownership of all of the outstanding capital stock of the Central Pacific Railway Company during the continuance of such lease. We deem it in the public interest that the applicant should be restricted from voluntarily disposing of the capital stock of the Central Pacific Railway without our approval, and further, that the lease should by its terms become null and void and of no effect if and when the control herein sought is found by us to interfere with the consummation of such plan of consolidation.

The question has been raised as to whether an acquisition of control under the circumstances proposed amounts to a consolidation of the carriers concerned "into a single system for ownership and operation," as to which type of control we have no jurisdiction under paragraph (2) of Section 5. We have given consideration to the question and find that an acquisition of control consummated as proposed and exercised subject to the conditions to be imposed by our order herein, does not involve the consolidation of such carriers into a single system for ownership and operation. It is not enough to constitute such a consolidation that the carriers or their properties be consolidated into a single system for operation, or for management, or for management and operation, but it must also appear that they are consolidated for

ownership. Since each of the carriers will retain its corporate identity and the legal title to its property, no consolidation of the kind defined by the statute will result.

Upon the whole record we find that the acquisition of control of the Central Pacific by the Southern Pacific Company, by lease and stock ownership as asked in the application, will be in the public interest, provided that the foregoing terms and conditions be imposed upon such control and the exercise thereof, and said terms and conditions are hereby imposed and the Southern Pacific Company is directed to observe the same so long as such control shall be exercised by it pursuant to our authority.

An appropriate order will be entered.

[C]

Nickel Plate Unification

Interstate Commerce Commission (1926), 105 I. C. C. 425

MEYER, *Commissioner* :

The application in Finance Docket No. 4671 was filed by the New York, Chicago & St. Louis Railway Company, hereinafter termed the new company, a corporation organized under the laws of the state of Ohio for the purpose, among others, of engaging in transportation subject to the Interstate Commerce Act. It seeks authority under paragraph (2) of Section 5 of the act to acquire control of the Chesapeake & Ohio Railway Company, the Hocking Valley Railway Company, the Erie Railroad Company, the Pere Marquette Railway Company, and the New York, Chicago & St. Louis Railroad Company, hereinafter referred to, respectively, as the Chesapeake, the Hocking, the Erie, the Pere Marquette, and the Nickel Plate, or as the lessor companies. Each of the lessor companies is a carrier by railroad engaged in transportation subject to the act. They join in the application of the new company. The new company also seeks authority under Section 20a of the act to issue securities to be used in connection with the proposed acquisitions.

Control by the new company is sought to be acquired (1) under leases for 999 years from the lessor companies of the lines of railway and of other properties, owned by them, respectively, and by assignment from each lessor company of the leases whereby such lessor

company now operates existing railways of its system not owned by it, or by sublease thereof from such lessor company, and by the assignment of any and all trackage and operating rights over foreign lines, and (2) by the acquisition of at least a majority of the capital stock of the Chesapeake, the Hocking, the Erie, and the Pere Marquette. It will be noted that it is not proposed to acquire any of the capital stock of the Nickel Plate. The proposed leases from the Nickel Plate, the Chesapeake, the Erie, and the Pere Marquette would run directly to the new company. The proposed lease from the Hocking would run to the Chesapeake and would be assigned to the new company. . . .

Forms of the proposed leases were submitted with the application. Their main provisions may be summarized as follows: They transfer the right to the use of all of the lessor companies' assets, personal as well as real, including, with some exceptions, the holdings of securities of other railroad companies. The Nickel Plate is the only lessor company which retains the right to acquire and operate other railway properties free from the provisions of the leases. The new company will receive the entire gross income from all leased properties subject to the provisions of the leases. It will be obligated to pay all taxes upon the leased properties or the earnings and income therefrom; all interest charges, all rentals, and other charges under all leases to and other contracts of the lessor companies; all expenses and liability from operation and maintenance of the leased properties; all expenses of maintaining the lessor companies' corporate structures, enabling them to do whatever may be required by the new company under the lease or by public authorities; and all current obligations and liabilities. The new company further obligates itself to keep insured such of the leased properties as are usually insured by railroad companies; to perform and discharge all contracts, duties, and obligations imposed on lessor companies by law or otherwise; to defend actions, suits, and proceedings against lessor companies; to maintain the leased physical properties in as good condition as when received; to replace equipment destroyed or retired; and to operate and develop the leased properties to its best ability. Each lease provides for the return of the leased properties at the expiration or earlier termination of the lease, for accounting between the parties, and for reëntry and other remedies in case of default.

With respect to capital obligations of each lessor, the new company undertakes to pay them for account of the lessor, or provide for them

by refunding or otherwise, with the right to reimbursement in securities of the lessor company at par, the new company to take care of such securities as all others.

In addition to control through leases, it is proposed that the new company shall acquire as much as possible of the outstanding capital stock of each of the lessor companies, with the exception, as will be developed later, of the Nickel Plate, by the exchange therefor of stock to be issued by the new company. For this purpose the new company will issue 6 per cent cumulative preferred stock and common stock, but the preferred stock is to have voting rights only upon certain rather remote contingencies. The terms of the proposed exchange are made part of the leases and require the new company to issue to the stockholders of the lessor companies, at their option, in exchange for their shares, stock of the new company at the following ratios :

FOR 100 SHARES OF	NEW COMPANY'S PREFERRED	NEW COMPANY'S COMMON
	<i>Shares</i>	<i>Shares</i>
Chesapeake preferred	115	—
Chesapeake common	55	55
Hocking common	50	50
Erie first and second preferred	50	—
Erie common	—	40
Pere Marquette prior preference	100	—
Pere Marquette preferred	90	—
Pere Marquette common	—	85

As stated above, no proposal is made for an exchange of stock with the stockholders of the Nickel Plate, but it is proposed to issue to the Nickel Plate itself capital stock of the new company equal in amount and kind to the outstanding capital stock of the Nickel Plate.

The outstanding capital stock of the lessor companies affected by the plan is as follows :

	PREFERRED	COMMON
Chesapeake	\$12,561,700	\$65,425,725
Hocking	—	11,000,000
Erie	63,904,400	112,481,900
Pere Marquette	23,629,000	45,046,000
Nickel Plate	25,865,666	30,406,464
Total	\$125,960,766	\$264,360,089
Total preferred and common	\$390,320,855	

Against this the new company is to issue \$131,715,119.75 of preferred stock and \$150,753,522.75 of common stock. It is also proposed to issue \$50,000 of each class of stock to be sold for cash for organization purposes; and to provide for probable increases in outstanding capital stock of the Chesapeake through the conversion of its bonds amounting to \$38,073,500 it is necessary to reserve an additional amount of \$46,534,277.78 in stock of the new company, making a total stock issue of \$329,102,920.28. There is also a possible increase in stock of the Erie through conversion of outstanding bonds, but such conversion is considered so improbable as to be omitted from these calculations. Applicants stress the fact that on this basis a reduction of \$103,521,823.61 in total capitalization will be brought about, but if the Nickel Plate stock which is not to be exchanged for that of the new company is considered, the reduction amounts to \$47,249,693.61.

The new company's capitalization, including the obligations of the lessor companies assumed by it, as of December 21, 1924, on the basis outlined, would be as follows:

Preferred stock	\$155,032,258.64
Common stock	<u>174,070,661.64</u>
Total stock	\$329,102,920.28
Funded debt	<u>621,802,892.32</u>
Total	\$950,905,812.60
Ratio of funded debt to stock	1.9 to 1
Ratio of common stock to preferred	1.12 to 1

No attempt has been made in this proceeding to ascertain the value of the properties of the lessor companies. Our tentative valuation of all those properties under Section 19a has not been completed. A "constructive cost" to December 31, 1924, of the physical railway properties of the new system, after deducting depreciation of equipment at the rate of 4 per cent per annum down to salvage value, has been ascertained by applicants to be \$991,550,474. This "constructive cost" is based on underlying engineering and land reports of our Bureau of Valuation and subsequent expenditures for additions and betterments as reported to us. It covers only physical railway properties and does not include allowances for material and supplies or other working capital. Applicants estimate the value of other assets of these companies to be at least \$140,000,000. If our final values should not fall substantially below these tentative estimates, the proposed aggregate capitalization is conservative.

Provisions of the leases in so far as they affect stockholders of the

lessor companies, other than the Nickel Plate, who do not elect to exchange their shares on the basis proposed, will be considered later. . . .

We come now to the principal questions in this proceeding: (1) Are the proposed acquisitions of control in the public interest and (2) are the considerations, terms, and conditions of the proposed acquisitions of control just and reasonable? . . .

There will . . . be included in the system of the new company approximately 9160 miles of road, including trackage rights, in the United States, and 337 miles in the Dominion of Canada. The main lines of the system will extend from the Atlantic ports of New York and Newport News to connections with the principal western, northwestern, and southwestern railroads at the important gateways of Chicago, Peoria, and St. Louis. It will also reach many other important cities and gateways like Louisville, Cincinnati, Indianapolis, Rochester, Buffalo, Erie, Cleveland, Sandusky, Toledo, Columbus, and Fort Wayne, Indiana, and be strongly represented in the industrial section of Michigan; in the Mahoning and Shenango steel districts of Pennsylvania and Ohio; in the rubber industry in and about Akron; in the anthracite and bituminous coal fields of Pennsylvania; and in the extensive coal fields of southern West Virginia, Kentucky, and Ohio. It will afford an outlet for the coal to tidewater, to the Great Lakes, and to the North and West. It will be in a position to serve with a single-line haul its territory, which includes the great industrial region adjacent to the Great Lakes to and from the points above named and intermediate points.

The applicants enumerate various advantages to the public through the proposed unification of operations, among which may be mentioned the following: At common terminal points, particularly Chicago and Buffalo, certain of the lessor companies either occupy leased facilities or own facilities not proportionate to their needs. Unification will make possible a fuller utilization of terminals and more rapid, satisfactory, and frequent service. Shop facilities will be used to the maximum capacity, as a result of distribution of work to shops best qualified by capacity and equipment to perform it. There are thirty-six points of interchange between the lines of the lessor companies, at each of which there is joint interchange, inspection, and record. The delays incident to this inspection and record will be eliminated and movement through most of the points will be continuous. Consolidation of revenue and distribution of costs will make practicable new and additional through routes. The Pere Marquette car ferries across Lake Michigan operate

throughout the year and favorable interchange arrangements are in effect with the northwestern lines at Milwaukee, Manitowoc, and Kewaunee. For the first time these routes will be connected by a single system with most of the important cities in central and trunk-line territories. It is anticipated that this ferry route can be greatly developed with consequent economy in operation as contrasted with all-rail movement, particularly through Chicago.

Movement of coal from mines on the Chesapeake and the Hocking can be better controlled and expedited, particularly with respect to the return of empties, an important factor in coal movements. In central territory the Nickel Plate, Erie, and Pere Marquette are the only important carriers which have substantially no bituminous coal production on their lines. The Erie has some on its lines in Pennsylvania. On the other hand the Chesapeake and Hocking are primarily coal carriers and the unification of all five will result in the new company resting on a broader traffic base. The tendency of this will be to increase the financial stability of the entire system, which in turn will tend to insure a higher quality of service. The New York Central, Pennsylvania, and Baltimore & Ohio systems, the principal competitors of the new company in central territory, serve large coal areas. Unified operation will result in a better distribution of iron and steel products, automobiles, and various other manufactured products produced on the lines of the lessor companies, as they can be handled by a one-line haul throughout an extensive territory. Strengthening of the traffic relations of the Chesapeake will be beneficial to the port of Hampton Roads.

One of the most important factors in the unified system will be the movement of traffic over the most economical routes, having regard to density of traffic, congestion at terminals, and grades. . . .

Altogether it is estimated that the proposed unified operation would result in annual savings of more than \$6,000,000. Many, if not all, of the savings are not dependent upon unification in the exact manner proposed here but could be brought about if control were only by stock ownership, or in many cases by inter-company contracts providing for the use of such joint facilities as it is proposed the unified system will establish. But that is not to say that the things mentioned cannot more certainly and easily be brought about when the lines are under one management and control.

Without unification it is said that the Chesapeake would have to spend over \$23,000,000 in revising its Chicago division, and the Erie nearly \$32,000,000 in revising its lines between Marion and Meadville

and between Kennedy and Steamburg, New York, a total of about \$55,000,000. As against this capital expenditure it will be necessary in the near future, in order to provide for the increased traffic, to complete the double tracking of the Nickel Plate's line between Lima and Brocton, New York, at a cost of over \$8,000,000.

Reference is made to the fact that the Erie, Chesapeake, Pere Marquette, and Nickel Plate compete to some extent with each other. Thus the Chesapeake and Erie are in competition for traffic through Atlantic ports to Chicago and the West. The Nickel Plate and Erie are in competition between Chicago and Buffalo, and, through the Nickel Plate's connections, the competition extends to New York. So, too, is the Pere Marquette somewhat of a factor in the situation. But we believe that it is unquestionable that the chief and by far the strongest competitors for traffic between Chicago and the West, on the one hand, and New York and the Atlantic seaboard, on the other, are the New York Central, Pennsylvania, and Baltimore & Ohio systems. These systems have grown to their present size and strength by a gradual process of accretion. The system proposed would create a fourth powerful competitor of the three systems named, which have long been strongly intrenched in the territory. There has been no serious suggestion that they be disrupted. One of the fundamental objects of the Transportation Act, 1920, of which paragraphs (2) to (8) of Section 5 are an important part, is to maintain an adequate railway service for the people of the United States. . . .

As we have heretofore pointed out, the competition which the proposed system must meet will be furnished by the Pennsylvania, New York Central, and Baltimore & Ohio systems. Applicants contend that their proposal will result in better balanced competition than is possible by the separate components of the system. They make various comparisons of population, traffic, and operating results of the proposed system with the three systems named.

The cities in the territory to be served by the proposed system having in 1923 an estimated population of more than 75,000 each, are served as follows :

SERVED BY	NUMBER	TOTAL POPULATION
Pennsylvania	35	19,876,125
New York Central	30	17,655,669
Proposed system	28	17,465,071
Baltimore & Ohio	19	17,266,303

No important city will be deprived of railroad competition by the proposed unification and, while traffic will be routed so as to avoid congested terminals and otherwise improve and expedite service and reduce operating costs, there is no indication that any existing route will be closed. On the contrary, from stipulations of record affecting weaker connections, a much different spirit has been manifested. . . .

It seems clear that the proposed unification is a step along the right lines in carrying out the policy of Congress, as expressed in Section 5 of the act, of encouraging the formation of a limited number of systems, which, as it affects the eastern territory, outside of New England, and considering the railway situation in that district today, dominated as it is by three long-established systems, would result in nearly all of the principal producing and consuming centers of the territory being served by two or more and in many instances by all of the limited number of systems. Each system would ramify throughout the territory. Each would have adequate access to sources of fuel supply as well as participation to a large extent in the commercial distribution of coal. Each would serve at least two of the five North Atlantic ports and have adequate access to lower lake ports. Mileage, property investment, gross earnings, and net railway operating income would be more nearly equalized than is possible in the case of the present number of systems, or even the number proposed in the tentative plan. The systems would more nearly approach an equality of opportunity to serve the public throughout the territory, to provide adequate facilities and to make necessary extensions from time to time with reasonable expectation of securing additional traffic. A greater amount of actual and effective competition in service may be assured by a limited number of well-articulated systems than by a greater number of systems less complete.

Other meritorious groupings of these carriers might be proposed, but viewing the grouping presented in this application strictly from a transportation standpoint, we find that the proposed acquisitions of control are in the public interest.

We have now to consider the question: Are the considerations, terms, and conditions of the proposed acquisitions of control just and reasonable?

Acquisitions of control upon the considerations, terms, and conditions proposed were vigorously opposed by the interveners, one of whom, as a stockholders' committee, representing 143,325 shares of Chesapeake, known as the Scott committee, voted against approval

of the proposed lease at a stockholders' meeting held on March 30, 1925. The Hocking interveners represent 11,590 shares of Hocking stock, or approximately 53.5 per cent of the minority stock of the company.

The plan of acquiring control of the lessor companies by lease and stock control heretofore outlined, was proposed by O. P. and M. J. Van Sweringen, hereinafter referred to as the Van Sweringens, under date of August 20, 1924. At that time more than a majority of the members of the boards of directors of the Chesapeake, Hocking, and Nickel Plate were common to all three companies, with the same chairman. On August 19, 1924, the board of directors of the Nickel Plate approved the proposal and recommended it to its stockholders. On August 25, 1924, at 2 P.M., a directors' meeting of the Chesapeake was held, at which similar action was taken. Of the eight directors present and voting for approval of the proposal, five had previously approved it on August 19 as members of the Nickel Plate board. Another director was president and a director of the Chesapeake and Hocking. On August 25, 1924, at 2.20 P.M. (which it will be noted was twenty minutes after the Chesapeake board had been convened), a meeting of the Hocking board of directors was held at which the proposal was approved. Of the nine directors present, seven had just voted in the Chesapeake meeting. On January 20, 1925, the boards of the Chesapeake and Hocking in formal meetings lasting a few minutes approved the proposed leases. At each meeting seven of the nine and ten directors, respectively, voting were also directors of Nickel Plate. On the same day, the articles of incorporation of the new company were drawn up. All of the incorporators were directors of the Nickel Plate and all except one were directors of the Chesapeake and Hocking.

A special meeting of the stockholders of the Chesapeake was held on March 30, 1925. The inspectors of election reported that 850,848 shares were outstanding and entitled to vote, and 659,360 shares present or represented at the meeting. Of this number 506,542 shares were voted by the deposit committee named in the proposal and 152,818 shares, of which interveners represented 143,323, against approval of the proposed lease. Previous to this meeting interveners had formally requested permission to prepare a list of the stockholders. Only after notice was given of intention to apply for a writ of mandamus was such a list furnished. This was done on March 12, or only two weeks before the special meeting.

Aside from the legal rights of stockholders, it seems obvious that it is in the public interest that stockholders' lists be readily available to all stockholders, possibly restricted to those holding a minimum amount of stock, under reasonable rules and regulations prescribed by the board of directors. It is not proper for officials of a railway company to inquire regarding the purposes for which a stockholders' list may be desired by a stockholder or group of stockholders. Any other course on the part of officials is in violation of their trust relationship to all the stockholders.

The special meeting of stockholders of the Hocking was held on March 28, 1925, at which 106,555 shares of the total of 110,000 shares were represented. Of these 90,665 shares were voted by the deposit committee in favor of the proposal and 15,890 shares against it. This latter amount represented over 73 per cent of minority stock, that is, stock other than that owned by the Chesapeake.

The record leaves no doubt that the interests dominating the Chesapeake and Hocking, which, as we have pointed out, are those controlling the Nickel Plate, used every weapon at their command to crush all opposition to their predetermined course of action, and that there was an utter lack of independent and impartial representation of all of the stockholders of the Chesapeake and Hocking when consideration was being given by their directors to approval of the plan and the terms of the proposed leases. Requests made by stockholders for relevant and material information were met by evasion or refusal. All but two of the directors of the Chesapeake who voted in favor of the plan were vitally interested in the result from a viewpoint far different from that of mere stockholders in the Chesapeake. Of the two exceptions, one represented certain outside interests which immediately bought amounts of Erie and Pere Marquette and the other was the president of the Chesapeake, whose hands were tied.

The contrast between the manner in which the interests of all the stockholders of the Chesapeake and of the Hocking were represented and the manner in which the interests of stockholders of Pere Marquette and Erie were protected is striking. In the latter two instances dealings were at arm's length. None of the directors of the Erie or of the Pere Marquette was a director of the Nickel Plate. The board of directors of the Erie had the matter under consideration for months, and the minutes of its several committees as well as those of the board itself show that the stockholders of that company had the benefit of the fullest consideration of the proposal and independent advice as to

its terms and conditions, and certain amendments and revisions were insisted upon. The chairman of the board and president did not vote upon the question because he considered that he represented all the stockholders and as some of them objected to the proposal he did not deem it proper to commit himself.

A special committee of three directors of the Pere Marquette was appointed to study the proposal and its minutes and those of the board of directors show that the stockholders had the benefit of the fullest consideration, as well as independent advice, which resulted in very substantial changes in the terms and conditions of the proposed lease, the rights and preferences to be enjoyed by stockholders of the new company, and the ratios of stock exchange, the results of the negotiations in the latter respect resulting in an increase in the ratio of exchange from 90 to 100 for prior preference, 85 to 90 for preferred, and 70 to 85 for common stock.

Under any circumstances the burden is upon applicants to make an affirmative showing that the terms, conditions, and considerations of acquisitions and control are just and reasonable. In view of the situation described above, the responsibility resting upon us to subject the entire transaction to the closest scrutiny is particularly grave, and a corresponding responsibility rested upon applicants to make a record which would disclose all the facts. Applicants repeatedly and unreservedly invited the criticism and judgment of the commission regarding every feature of the proposal. However, applicants' original plan of presentation does not appear to have contemplated nearly as complete a showing on the record as the importance of the case and the character of the issues fairly required. Much of the applicants' evidence appears to have been prepared after the hearings had begun, to meet objections made by interveners and suggestions by the presiding commissioner. Great undertakings like this proposal should be supported by a strong and clear affirmative showing which will fairly meet in advance of rebuttal every substantial objection which reasonably can be anticipated.

One of the proponents of this plan testified that "if we could not control the properties to the extent necessary to assure continuity of policy we did not want to be interested in them." Through their control of 80 per cent of the voting stock of the Vaness Company, a personal holding corporation, the Van Sweringens now control 54.17 per cent of the voting stock of the Nickel Plate, but they control directly or indirectly only 32.85 per cent of all the voting stock of the com-

panies affected by their proposal. But under their plan they will directly or indirectly control, without purchasing a single additional share, 50.93 per cent of the voting stock of the new company, and thus will effectually control its management and operation. . . . Assuming conversion of the Chesapeake's convertible bonds, the percentages would be 29.43 per cent before and 44.12 per cent after the plan became effective, the latter, under modern conditions, being sufficient effectively to control a large corporation.

This is accomplished principally in two ways. The first is to have the new company issue preferred stock without voting power, except in certain contingencies not material here, in an amount which compares to the common stock as 1 to 1.12.

There are outstanding 1,000,951 shares of voting preferred stock of the lessor companies. In exchange therefor 687,843 shares of nonvoting preferred stock of the new company will be issued. The new company will also issue nonvoting preferred stock equal in amount to the nonvoting preferred stock of the Nickel Plate. Thus the preferred stockholders of the Nickel Plate sustain no loss of voting rights, while preferred stockholders of other lessor companies sustain a complete loss of such rights. In addition to that Chesapeake stockholders are offered 55 shares of common stock and 55 shares of nonvoting preferred stock for each 100 shares of Chesapeake common; while Hocking stockholders, other than the Chesapeake, are offered 50 common and 50 preferred for each 100 shares, thus effecting a further reduction in voting power. It is not proposed to issue any stock of the new company for Hocking stock owned by the Chesapeake, but it is to pass to the new company under the lease. This stock is pledged to secure some Chesapeake bonds. It is explained that on this account it cannot be exchanged for stock of the new company, but apparently it would not be difficult to provide for such exchange when freed from existing liens, which have at the most only six years to run. It is impossible to determine what, if any, consideration was given to the Chesapeake equity in this stock. At the hearing witnesses for applicants stated that in fixing the ratios it was taken into consideration. Upon brief our attention is directed to the premium on the Chesapeake's stock in exchange for stock of the new company as the consideration, but if that is so the amount of the consideration to be paid is either less, on the basis of the amount of Chesapeake stock outstanding at the time of the proposal, or very much greater, on the basis of the amount of Chesapeake stock that will be outstanding after conversion

of bonds, than is proposed to be given for stock of the Hocking in the hands of the public.

Adverting to stock control, we have heretofore pointed out that the plan does not contemplate exchange of stock by the Nickel Plate stockholders. They therefore suffer no diminution of their voting power. On the other hand the Nickel Plate, having leased its railroad and received therefor stock of the new company equal to its own stock, and having exchanged its holdings of Chesapeake and Pere Marquette stock for stock of the new company, will in effect be a holding company controlled by the Van Sweringens through their holdings in the Vaness Company. This will give them control of this large transportation system without the necessity of owning an actual majority of even the voting stock, much less all of the stock.

We cannot escape the conclusion that the plan was arranged with the intention of keeping control in the hands of its proponents even though their interest is a minority one in fact. Such an arrangement is not in accord with sound railroad practice. The Nickel Plate is the only railroad of importance in the country in which preferred stockholders do not have the right to vote, and now it is proposed to extend this feature to over \$155,000,000 of new stock of a company comparable with the New York Central, Pennsylvania, and Baltimore & Ohio. The common stock of the new company will not greatly exceed \$174,000,000 out of a total capitalization of over \$950,000,000. We believe it to be self-evident that the public interest requires that the entire body of stockholders of a railroad which is bonded in excess of one half of its investment, and not a powerful few, shall be responsible for its management. This can be done only by giving them the power to control the management. The lethargy of ordinary stockholders in exercising their power to control the management of these large corporations has often been commented on, but nevertheless the power should be in their hands to use as they see fit. It is inimical to the public interest to strip stockholders of their voting power, thus rendering it so much easier to control a great transportation system by a comparatively limited amount of investment.

Hovering in the background of this entire question of control in this case is the trust agreement dated January 11, 1924, described by counsel as being in the nature of a last will and testament. Under this agreement the Van Sweringens as owners of 130,000 shares of common (voting) stock of the Vaness Company, and C. L. Bradley and J. R.

Nutt, both directors of the Nickel Plate, as owners of 16,250 shares each of the common stock of the Vaness Company, deposited such stock with a trustee, receiving in lieu thereof trust certificates representing "certificates of interest in the common stock" of the Vaness Company proportionate to the number of shares deposited. The stock so deposited constitutes the entire voting stock of the Vaness Company. The certificates issued to Bradley and Nutt and the rights represented thereby are subject to purchase by the Van Sweringens under the terms of an option expressed in the agreement. The certificates are assignable and transferable upon the books of the trustee "subject to the terms and conditions of the agreement." The agreement constitutes and appoints the four gentlemen named "managers" of the trust, which is to continue for twenty-one years after the death of the last survivor with the right on the part of the survivor to appoint successors to a deceased manager. Without giving further details of this trust agreement, it is sufficient to say that under it the Van Sweringens may divest themselves of all beneficial interest in the Vaness Company stock and still retain voting control of the new company without direct or indirect ownership of a share of stock therein.

With respect to the reasonableness of the proposed terms of stock exchange, the applicants state that "those considerations, terms and conditions, were not arrived at, nor could they have been arrived at, by the use of a mathematical formula. Nor may the justness and reasonableness thereof be made the subject of any process of exact demonstration." But it is evident from the record that inadequate consideration was given to the terms from the viewpoint of the stockholders of the Chesapeake and Hocking. The president of those two companies was not asked to submit any information or figures bearing on the matter while the plan was under consideration, and had no part in fixing the terms beyond a few general suggestions as to the factors to be considered. He first learned of the proposal from the newspapers and voted to approve it without change. Other directors acted principally on the basis of the balance sheet and income account annexed to the plan and a general inspection of railway and financial manuals and annual reports. They could produce no memoranda or data actually considered by them or by the respective boards although data used by the Erie and Pere Marquette boards were produced. It brings forcibly to mind what we said in *Financial Transactions C., R. I. & P. Ry. Co.*, 36 I. C. C. 43:

This record emphasized the need of railway directors who actually direct. There are too many passive directors who acquiesce in what is being done without knowledge and without investigation. A director of a railroad is a quasi-public official who occupies a position of trust.

The boards of the Chesapeake and the Hocking appear to have acted as boards of ratification rather than authorization or direction with respect to these matters.

It is obvious that all of the many elements to be taken into consideration were not so considered when the proposal was being drawn up or else the employment of experts after the commencement of the hearing to compile, adjust, and compare earnings, property values, book values, and the like would have been largely unnecessary. The information would have been available at the opening of the hearing. One expert used 1923 only in determining "normal net income," another used 1923 and 1924, and another used 1923 and 1924 net income of the Nickel Plate, Erie, and Pere Marquette, and 1922, 1923, and 1924 net income of the Chesapeake and Hocking. Without going into further details it is sufficient to say that whatever test applicants have used in trying to sustain the predetermined ratios they have not sustained the burden of showing that the ratios are just and reasonable as between the stockholders of the respective lessor companies. The traffic of the Chesapeake and Hocking has increased greatly year by year, and together these two roads now constitute one of the most efficient coal-transportation machines in the country and undoubtedly would constitute the backbone of the proposed system. The Hocking earned on its common stock \$16.50 per share in 1923 and \$24 per share in 1924, but dividends of only \$4 per share were paid in each year. The Chesapeake had net income, including its equity in Hocking income, equivalent to \$12.93 per share of common stock in 1923 and \$19.26 in 1924, but dividends of only \$4 were paid each year. Applicants refer to the "judgment of the market place." It seems only necessary to refer to the prices on the New York Stock Exchange on August 8, 1924, when the proposal was announced, on April 17, 1925, ten days after the hearings began, and on December 12, 1925. The latter quotations are not of record, but we believe we are justified in making note of the prices.

	AUGUST 8, 1924	APRIL 17, 1925	DECEMBER 12, 1925
Nickel Plate common . .	110 $\frac{1}{8}$	126 $\frac{3}{8}$	178
Chesapeake common . .	90 $\frac{5}{8}$	91 $\frac{5}{8}$	122

But aside from what has been previously stated, there is another matter which renders it impossible on this record to approve these ratios. We refer to the inclusion of the anthracite-coal properties of the Erie. The record is confusing and vague as to their value, and renders it impossible to reach a definite conclusion as to what ratios would be fair.

As far back as *The New England Investigations*, 27 I. C. C. 560, 616, we said :

Every interstate railroad should be prohibited from expending money or incurring liability or acquiring property not in the operation of its railroad or in the legitimate improvement, extension, or development of that railroad.

Paragraph (2) of Section 5 has reference to acquisition of control of carriers. Section 20a, under which application is made for authority to issue securities, provides that we can make an order authorizing proposed issues of securities or assumption of liability only if we find (a) that the issue or assumption is for some lawful object within the corporate purposes of the applicant, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

Applicants have made no such showing as to the inclusion of these anthracite properties in the proposed new system. Furthermore the Federal courts in several instances have compelled the complete separation of common carriers and their anthracite-coal properties.

We have heretofore pointed out that the new company does not intend to operate several subsidiaries of the Erie system, said to be unprofitable, although the Erie's stock holdings in those companies are to be taken over. These subsidiaries have been integral parts of the Erie system for many years and they cannot be sloughed off except on a proper affirmative showing. All show corporate deficits as of December 31, 1924, and the Erie's assets are distorted to the extent of over \$5,000,000 representing "traffic and car-service balances" and "miscellaneous accounts receivable" due from subsidiaries.

The provisions of the leases dealing with the rights of nonassenting stockholders of the lessor companies, other than the Nickel Plate, appear to be designed to coerce all the stockholders into exchanging their stock for that of the new company upon the terms proposed. The options given them are largely illusory. That with reference to taking

average market value is conceded to be unfair but we understand applicants are willing to make this "fair value." Resort to litigation to determine the value of stock is a poor remedy.

Applicants concede not only that we have jurisdiction to pass upon the reasonableness of the considerations, terms, and conditions, but request us, particularly with reference to the ratios of stock exchange, to indicate what in our opinion would be just and reasonable. For the reasons heretofore pointed out, it is impossible upon this record, voluminous as it is, to so find. However, the burden of ascertaining or determining proper ratios of exchange should not be cast upon us. If all the stockholders are impartially represented in the preliminary discussions they should be able to reach an agreement which can secure the approval of substantially all of the stockholders. If all the stockholders of the Chesapeake and Hocking had been represented by independent negotiators, the transcript of these hearings would read differently and our findings would be different. The burden is upon applicants to justify the justness and reasonableness of the ratios of exchange. We should not be expected to do more than ascertain that fact upon the record. We should not be expected to arbitrate to the fraction of a share just what each stockholder should receive. Many similar applications will probably be filed in the future and if all of these applicants, like the instant one, should request us to adjudicate their differences in the commercial aspects of buying and selling railroad properties, the law would probably become unworkable. We cannot undertake, at the request of parties, virtually to trade in several hundred thousand miles of railroads and at the same time perform our legitimate duties under the law.

In view of the fundamental objections relating to the financial aspects of applicants' proposals pointed out in this report, we do not deem it necessary to discuss many other matters covered by the record. We have considered the latter in so far as they have any material relation to this proceeding. They include the means by which the present Nickel Plate was brought into being and control secured by the Van Sweringens; how the latter secured control of the Chesapeake and Hocking; their personal profits, actual and prospective; various transactions in connection with the Cleveland Union Terminal; the Ross employment contract; acquisition by the Nickel Plate of terminal properties near Chicago through the medium of the Calumet Trust in which the Vaness Company has 89 per cent of the beneficial interest; and the relations between the Van Sweringens and

the Union Trust Company of Cleveland, J. P. Morgan & Company, the First National Bank of New York, and the Guaranty Trust Company of New York.

We, therefore, find that the considerations, terms, and conditions of the proposed acquisitions of control are not just and reasonable. Aside from the transportation aspect the proposed acquisitions of control upon the considerations, terms, and conditions proposed have not been shown to be in the public interest. The application must be denied. This action necessitates similar disposition of the application for authority to issue securities.

QUESTIONS

1. How does the acquisition of the stock of a railroad or the leasing of a railroad differ from consolidation?

2. Is this chiefly a legal difference or an economic difference?

3. To what extent have railroad companies been considered subject to the Sherman Act?

4. On what grounds had the Supreme Court ordered the termination of control of the Central Pacific by the Southern Pacific?

5. Did the Southern Pacific consider that the Interstate Commerce Commission had authority to override a decree of the Supreme Court? Why?

6. On what economic grounds can the continuance of the Southern Pacific's control over the Central Pacific be justified?

7. Can you suggest any arrangement of the roads to the west coast which might be more satisfactory?

8. Explain the advantages from the point of view of transportation that might have come from the approval of the Nickel Plate unification plan.

9. To whom would the unification have been a financial advantage?

10. Analyze the reasons for the Commission's disapproval of the Nickel Plate unification plan.

11. Draw up a revision of the plan which will meet the Commission's objections.

12. Would your plan be acceptable to the stockholders of each of the companies concerned? to the Van Sweringens?

13. The Lehigh Valley Railroad and the Delaware, Lackawanna and Western Railroad both have lines from Buffalo to New York City. The former applies to the Interstate Commerce Commission for permission to lease the lines of the latter, alleging that economies would result from such action and that increased profits would be earned for the stockholders of the two roads. Decide.

14. A Canadian railroad applies for permission to lease a road about seventy miles long in Vermont. The state objects, on the ground that such a lease by an alien corporation is contrary to its policy. The lease will be of particular benefit in times of congestion and will help to give the manufacturers of New England differential west-bound rates. Decide whether the lease should be approved.

15. Application is made for permission to lease a profitable road by a road which has had a deficit for several years. The roads are a hundred miles apart, having physical connection only over other carriers. They are controlled by a leather company, and a considerable amount of their traffic consists of the company's products. Draw up arguments for and against the granting of the application. What will the Commission's decision be?

16. Outline the general conditions that must be fulfilled before the Interstate Commerce Commission will grant permission for a railroad to lease the lines of another road or acquire control by the purchase of its stock.

17. Which are of more importance in the Commission's decisions on this subject: economic considerations or legal considerations?

18. Was the provision of the Clayton Act exempting railroads under certain conditions dictated by reasons of public policy or was it passed to aid the railroads in evading the antitrust laws?

19. A company is incorporated in Ohio for the purpose of buying, selling, and investing in securities. It purchases the control of several important railroads and proceeds to manage them in such a way that they are, to all intents and purposes, parts of one road. At what point in the process has the Commission jurisdiction? What should its action be?

3. OPERATION OF COMPETING STEAMSHIP LINES

[A]

[The pertinent statutory provisions are found in Section 5 of the Interstate Commerce Act, paragraphs 9, 10, and 11 (I. C. Act, pp. 21-22)].

[B]

Lake Line Applications under Panama Canal Act

Interstate Commerce Commission (1915), 33 I. C. C. 700

McCHORD, *Chairman*:

These cases are before this Commission upon petitions filed in accordance with the provisions of Section 5 of the Act to Regulate Commerce, as amended by the Panama Canal Act of August 24, 1912.

The petitioners are rail carriers owning or having an interest in one or more boat lines with boats plying on Lakes Ontario, Erie, Huron, Michigan, and Superior, hereinafter referred to as the Great Lakes. There has been no order consolidating these cases, but they were heard together. Each case has been considered and decided upon its own record, but as all of the cases involve many points in common, they will be disposed of in one report. . . .

The Mutual Transit Company is owned by the Mutual Terminal Company, which in turn is jointly owned by the Lehigh Valley Railroad Company, the Erie Railroad Company, the Delaware, Lackawanna & Western Railroad Company, and the New York Central and Hudson River Railroad Company. . . .

The Mutual Transit Company operates twelve vessels serving the ports of Buffalo, Fairport, and Cleveland on Lake Erie; the ports of Gladstone and Green Bay on Lake Michigan; and the ports of Duluth, Hancock, Houghton, Hubble, Fort William, Port Arthur, and Westport on Lake Superior. Two of the owning railroads, viz. the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, do not reach with their rails any of the ports served by this line other than the interchange port of Buffalo. The New York Central & Hudson River Railroad Company, over the Lake Shore and Michigan Southern and its other allied lines, reaches Chicago and Cleveland by rail, as does the Erie Railroad, over the rails of its subsidiary, the Chicago & Erie Railroad Company.

The Lehigh Valley Transportation Company is owned by the Lehigh Valley Railroad Company and is in addition to this railroad's interest in the Mutual Transit Company line. The only port served in common by the rails and the boats of this line is Buffalo, the port of interchange. . . .

The first controlling question arising under these applications is whether or not, within the meaning of the Panama Canal amendment, there is or may be competition for traffic between the vessels operated and the railroad interested in them.

This question would be easily answered in the affirmative if the ports of call were served in common by the boats and by the paralleling rails of the owning railroad. The physical situation would itself establish the case. It appears, though, that no such case is made out on the records here presented, since no two ports of call are served in common by the boats and the paralleling rails of the particular owning railroad entity. It is a fact, however, that in the case of the . . . New York

Central and Hudson River Railroad Company [and] the Erie Railroad Company, . . . the railroad entity owning the boats or the interest therein also owns, or has an interest in, other railroad entities whose paralleling rails do serve ports of call in common with the boats.

It is urged that this does not establish a case within the meaning of the act and that the act only applies to cases where there is competition, actual or potential, between the boats and the rails actually operated by the owning entity. . . .

The unsoundness of the contention is at once manifest when it is seen how in every case the act could be evaded by a reorganization incorporating the paralleling rails which reach the port of call into a railroad entity distinct from the entity owning the boats, with the real ownership, through stock control, remaining as before. The contention is faulty and is contrary to the spirit as well as the letter of the act. . . .

The case presented by the applications of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company requires a further consideration of the relation these roads bear toward the traffic hauled, or, rather, which might be hauled, by their boat lines. As before noted, the boat lines owned or in which these railroads have an interest, with the exception of the interchange port of Buffalo, serve no points in common with the rails of any part of the owning railroad system.

Each of these roads, however, is a party to through all-rail routes and joint rates to all the ports served by its boats with respect to west-bound and east-bound traffic. All of the principal carriers in central freight association territory concur in these rates, including the lines west of Buffalo, which form parts of systems controlled by the petitioning trunk-line carriers. . . .

The through all-rail routes and joint rates which these roads maintain with carriers connecting at their lake interchange ports for points beyond, including the ports served by their boats, are legitimate and necessary arrangements for the convenience and facility of their rail transportation.

These petitioners, in connection with all central freight association territory rail carriers, as shown by their concurrences, are the joint makers of tariffs publishing joint through rates for the all-rail transportation to and from the ports served by their boats. The only thing to indicate that the entire all-rail haul is not performed by their respective lines is the concurrence of their connections in these rates.

Together with their connections they make a through line from the east to the lake ports over which both east-bound and west-bound traffic moves all rail. They originate the west-bound traffic and control its routing. The actual result of these arrangements is the same as if these petitioners owned the rails reaching these ports.

The all-rail connections of the Lehigh Valley Railroad Company and the Delaware, Lackawanna & Western Railroad Company, which participate in the through route west of Buffalo, are capable of delivering to these roads at Buffalo many times the volume of east-bound tonnage that it would be possible for these roads to originate through the medium of their own boat lines and deliver to their rails at Buffalo. These petitioning roads, therefore, are very solicitous to promote and improve their relations with their western rail connections. Through route arrangements are reciprocal, since the entire movement of traffic is not in the one direction. So the one most potent way in which these petitioning roads can encourage a routing of the east-bound traffic from these western rail connections over their rails is to route as much west-bound traffic as possible over the particular connection or connections which are able to furnish the most east-bound traffic. The west-bound traffic which is so routed is necessarily diverted from the boats of these petitioners. This sacrifice of the boat lines is small when compared to the gains made by these petitioning carriers in the interchanging of all-rail traffic. The east-bound all-rail traffic in almost every instance might just as well be turned over at Buffalo to one of the several rivals of the petitioners extending east. The striving or rivalry for this east-bound traffic causes these petitioners to divert west-bound traffic from their boats, and when they do this they are competing with their boats within the meaning of the act as amended.

That the existence of paralleling through all-rail routes to which joint through rates are applicable, in which the petitioning railroad participates, is a circumstance bringing any application under this amendment within its provisions, seems clear when the amendment is considered in its application to the railroad ownership of, or interest in, boats operating through the Panama Canal. Neither at the time the amendment became a law, nor now, is there any transcontinental rail line owned or operated by a single railroad or system of railroads in the United States. If, therefore, the participation of a petitioning railroad in such through route arrangement does not constitute an arrangement by which it is possible for it to compete with its boats operating through the Panama Canal from and to common points,

then this amendment, as applied to traffic through the Panama Canal, is of no effect. . . .

The lake lines in which the petitioners are interested have been shorn of the initial rate-making power. This power has been usurped by the trunk-line association of which the petitioners are members. The through rates controlled by this authority, in which the boat lines are merely concurring carriers, determine for the shipper which lake line must be used. The particular route is controlled by applying arbitrary switching charges at Buffalo, which compel the through lake-and-rail traffic to move via the predetermined lake line. The zones of territory to be served and those not to be served by the lake lines are also determined by this outside authority. This is accomplished by maintaining a scale of rates, not subject to competition, that forces traffic by either all-rail or lake-and-rail routes, as desired by the trunk-line association. The interest and concern of the trunk-line association in fixing these different combinations of rates is simply the solidified interest of the several member railroads. . . .

From a consideration of all the circumstances the Commission is of opinion, and finds, that each of the applicants here involved does or may compete for traffic with the lake line or lines in which it has an interest.

In the present cases, however, which are not applications for the extension of a service operating through the Panama Canal, the finding that competition, actual or potential, exists does not *ipso facto* require the separation of the petitioning railroads from the boat lines in which they are interested within the meaning of the act. . . .

In passing on the question of whether or not the particular boat line is being operated within the proviso of the act it is necessary to first determine the purpose of the legislation which gave rise to these petitions. From an examination of the congressional debate from which the act emerged, it is at once clear that the spirit which undoubtedly prompted this legislation was a desire to preserve to the common interest of the people, free and unfettered, the "water road-bed" via the Panama Canal, which was nearing completion. Coupled as it is, the legislative purpose of the other parts of the amendment with respect to waters "elsewhere" must necessarily have been to restore all the water routes of the country to the same condition of freedom from any domination which would reduce their usefulness.

For any case to be within the spirit of this proviso it is necessary to show a situation in which are present all the elements which prevail,

or would prevail, were the water service independently operated. On a watercourse where the boats and boat lines are free from domination or control by the railroads, and where they are left to survive as their merit or the ingenuity of their owners makes possible, there will be and always is, a healthy rivalry and striving between such boat lines themselves and with paralleling railroads for all suitable and available traffic. There is competition. This rivalry manifests itself in several ways. The rates charged fluctuate according to economic principles, and the shipper enjoys invariably, as a result, lower charges for the transportation routed over such waterways and thereby reaps a return from the "nation's highway." Necessarily, coincident with the lowering of the rate, there is a rivalry in service which is an equally strong weapon of competition. The condition is one which results in the beneficial use of the waterways accruing to the shippers. As far as this legislation concerns water routes elsewhere than through the Panama Canal, the spirit and purpose of it is to restore to the people the beneficial use of the natural common highways.

The right to use the waterways of the country as a means of transportation is a natural right, but this right may not be abused to the injury of others, and it is the public right that the waters be so used as to return benefit to the people.

The waterways of the country furnish ready-made roadbeds for transportation routes, on which the rates for shipment may be made low because of this physical fact. But these arteries of commerce, without boats to ply on them, are useless for transportation purposes. And although there may be many boats plying on these water routes, they may be so operated as to produce practically the same condition of things as would exist were there no boats afloat.

As a natural and usual course of experience, where a railroad acquires and undertakes to operate a competing boat line, the rate for the water transportation ceases to be influenced solely by those ordinary conditions which affect such traffic, because a new element is introduced into the situation, namely, the interest of the owning railroad.

This discussion of general principles points the basis for the legislation here under consideration. If such is the basis, what is the purpose of the legislation, if it is not to relieve the watercourses of the country from the domination of the rail carriers?

Congress has decreed that there shall be a restoration of conditions which prevailed when railroads had no interest in and exercised no control over the boat lines plying the country's water routes. That

the legislation might not be arbitrary but be effective within constitutional limitations, certain provisions were made so that in given instances which form exceptions to the usual experiences in cases of joint ownership, such ownership may be continued. To comply with this legislative direction, however, it is necessary to divorce the railroads from their boat lines, unless the particular case comes within the exception as provided. If this is not the result, of what avail is this legislation?

The inquiry in these cases is, therefore, Is the joint operation of these boat lines such as to make them an exception? Or, in the words of the statute, Is the service by water being operated in the interest of the public, and is it of advantage to the convenience and commerce of the people, and will an extension and a continuance thereof exclude, prevent, or reduce competition on the route by water under consideration?

The contentions of petitioners as to responsibility and regularity of this service under joint operation lose weight when it appears that there has been no lowering of the cost of water transportation accompanying them. It appears from correspondence passing between a boat-line manager and an official of the owning railroad, which forms a part of these records, that this manager attributes the small tonnage hauled by his line, and the consequent small revenues, to the fact that the differential between the lake-and-rail rates and the all-rail rates is too small. He urged a larger differential, assuring his superior that such a policy would enable him to profitably operate the boat line.

Instead of lower rates in prospect, it is made to appear that it is only the greater financial strength of the owning railroads that enables the present boats to operate, as it is contended that certain boat lines are being operated at a loss. If this be true, then there is no prospect for lower rates under continued joint ownership, and the public is reaping little benefit from this waterway, and the situation is almost the same and will be the same as if no waterway existed.

No doubt, under joint operation, certain economies can be effected, but these economies have not manifested themselves in a reduced lake-and-rail transportation cost to the public. . . . There is much in the records tending to show that the very purpose of these advances in lake-and-rail rates was to divert tonnage to the all-rail lines. As a direct result of this rate policy of the owning railroads, the lake boats have operated with small cargoes, although their operating expense was almost as great as if they had been fully loaded. This has in turn

resulted in a high operating cost to the lake lines per unit of freight. Does not this policy fully explain the lake line deficit? Again, do not such facts make clear that whatever economies might be realized by joint ownership are offset by the waste resulting from the unfair use of vessel tonnage in the interest of the owning railroads? The railroad control of these boat lines cannot be said to be in the public interest when the policy of these railroads has been, by an artificial rate structure to deprive the public of the natural benefits that would flow from a free use of this waterway.

In deciding these cases, the Commission is required to judge as to whether or not these boat lines are being operated in the public interest under joint ownership, and then it must say whether the continuance of this operation will result in reducing, preventing, or excluding competition on the route by water.

That the joint ownership and operation of these boat lines has resulted in no real benefit to the people and that the operation is not in the interest of the public or of advantage to the convenience and commerce of the people is established by the facts as above indicated, and a complete monopoly is exercised by the owning railroads over the lake line situation. . . .

The records here show no instance where the boat lines owned by the different rail carriers have actively competed for traffic with one another or with the paralleling railroads under the régime of joint ownership and operation. Under independent operation each of the lines which is now owned and operated by a railroad, in order to survive, will become a competitor of every other boat line and of every paralleling railroad for all traffic which moves by the Great Lakes or which might move over that route, and the result of such operation will be reflected in the character of service furnished the public and in the rate charged therefor. . . .

These boat lines under the control of the petitioning railroads have been first a sword and then a shield. When these roads succeeded in gaining control of the boat lines which had been in competition with paralleling rails in which they were interested, and later effected their combination through the Lake Line Association, by which they were able to and did drive all independent boats from the through lake-and-rail transportation, they thereby destroyed the possibility of competition with their railroads other than such competition as they were of a mind to permit. Having disposed of real competition via the lakes, these boats are now held as a shield against possible com-

petition of new independents. Since it appears from the records that the railroads are able to operate their boat lines at a loss where there is now no competition from independent lines, it is manifest that they could and would operate at a further loss in a rate war against independents. The large financial resources of the owning railroads make it impossible for an independent to engage in a rate war with a boat line so financed.

From a consideration of all the circumstances and conditions disclosed by the respective records herein, the Commission is of opinion and finds that none of the several existing specified services by water herein concerned is being operated in the interest of the public or is of advantage to the convenience or commerce of the people within the meaning of the act, and that an extension and a continuance thereof will prevent, exclude, and reduce competition on the Great Lakes. The application of each of the petitioners herein is therefore denied, effective December 1, 1915. An order will be entered accordingly.

[C]

[The Lehigh Valley Railroad Company brought suit in the district court to enjoin enforcement of the Commission's order. The court held (234 Fed. 682) that, as the Commission's order was purely negative in form, leaving the carrier subject to the action of the statute as before, no jurisdiction rested in the court. In this it was upheld by the United States Supreme Court (243 U. S. 412). The district court further stated that the Commission was empowered to determine questions of fact as to competition and that authority of the court extended only to an investigation to determine whether the formal requirements of a hearing had been observed and whether the findings were based on relevant and substantial evidence. The power conferred on the Commission to permit the common control of water and land carriers, if the public interest was served thereby, was held to be constitutional and not an illegal delegation of legislative power.]

QUESTIONS

1. In what respect is water traffic through the Panama Canal subject to regulation different from that of other water traffic?
2. Under what general conditions may a railroad own a steamship line?
3. In the case quoted, what specific reason existed for denying permission for continued ownership of the boat line?

4. A carrier owns a schooner used to ship lumber for a subsidiary. The lumber-shipping point has no railroad line. The carrier asks permission to continue such ownership. Decide.

5. The Pennsylvania Railroad and the Canadian Pacific Railway Company own and operate a car ferry across Lake Erie from Ashtabula, Ohio, to Port Burwell, Canada. The companies apply to the Commission for permission to continue such ownership. Decide.

6. The Oregon-Washington Railroad and Navigation Company, a part of the Union Pacific system, is permitted to retain a steamship line from San Francisco to Portland, Oregon. On what grounds could such a decision be based?

7. A railroad company obtains control of the capital stock of a steamship company operating boats through the Panama Canal. It disposes of such stock in the form of a stock dividend to its stockholders. Is this action lawful?

8. The Southern Pacific owns and operates six boats on the Sacramento River, some of them between Sacramento and San Francisco. Over three hundred other boats are operated on the river, including some regular lines competing with those of the Southern Pacific. The railroad has a rail line from Sacramento to San Francisco, as well as a boat line. It applies for permission to continue ownership. Decide.

9. A steamship line is operated by the Southern Pacific between New York and New Orleans and Galveston. Is it necessary for the railroad to secure permission from the Interstate Commerce Commission in order to continue operation? If so, would such permission be given?

4. INTERLOCKING DIRECTORATES

[A]

[The pertinent statutory provisions are found in Section 20a of the Interstate Commerce Act, paragraph 12 (I. C. Act, p. 73).]

[B¹]

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 11th day of October, A.D. 1921

Whereas paragraph (1), Section 20a, of the Interstate Commerce Act is as follows:

¹ Thirty-fifth Annual Report of the Interstate Commerce Commission (1921), p. 219.

(1) That as used in this section the term "carrier" means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act.

And whereas the first sentence of paragraph (12), Section 20a of said act is as follows: [See I. C. Act. p. 73.]

It is ordered, That the following regulations be, and they are hereby, prescribed to be effective forthwith and until the further order of the Commission, viz.:

1. The term "carrier" as used in these regulations has the meaning defined in said paragraph (1).

2. The Commission interprets the first sentence of said paragraph (12) as covering any person, authorized by a carrier, as defined in said paragraph (1), to perform, temporarily or otherwise, the duties, or any of the duties, ordinarily performed by a director, president, vice president, secretary, treasurer, general counsel, general solicitor, general attorney, comptroller, general auditor, general manager, freight traffic manager, passenger traffic manager, chief engineer, general superintendent, general land and tax agent, or chief purchasing agent of the carrier.

3. Applications for orders of authorization under the first sentence of said paragraph (12) may be made by any interested carrier or by any person on his own behalf.

4. An application made by such a carrier may include a request for authorization as to more than one person, but such application must give the same information as to each person as if it referred to that person alone.

5. Each application shall state, as to each carrier, whether it is (a) an operating carrier, or (b) a lessor company, or (c) any other corporation organized for the purpose of engaging in transportation by railroad subject to the act.

6. In case any position covered by an application is with a carrier which has not made an annual report to the Commission, a full statement of pertinent facts relative to such carrier and its line of railroad shall be given.

7. Each application shall state fully the reasons why the granting of the authority sought will not affect adversely either public or private interests.

8. Each application shall give full information as to the relation-

ship, operating, financial, competitive, or otherwise, existing between the carriers covered by the requested authorization.

9. Each application shall specify as to each person for whom authority is sought the carriers covered by the requested authorization in which that person is the holder of shares of stock or bonds, or both.

In addition to the information so furnished in the application, there shall be furnished, when and as requested by the Commission, information regarding the financial interests, if any, and the nature and extent thereof, of each person for whom authority is sought in each of the carriers covered by the requested authorization and in any other corporation, copartnership, association, business, enterprise or venture, in so far as pertinent.

10. The application shall show whether or not any other application for authority has been made on behalf of any person or persons mentioned in the application, and, if so, give reference to the date of such other application, by whom made, and the action, if any, taken thereon.

11. The application shall show the positions held on the date thereof with the carriers covered by the requested authorization.

12. The original application and six copies thereof shall be filed with the secretary of the Commission at its office in Washington, D. C. The original shall be signed by the applicant, or in case of a corporation, by one of its officers authorized to sign on its behalf, and shall be verified under oath. . . .

[C¹]

The provision of paragraph (12) of Section 20a of the act making it unlawful for any person to hold the position of officer or director of more than one carrier unless authorized by us became effective January 1, 1922.

To aid us in the construction and administration of this provision, we held a hearing on November 30, 1921. Notice of this hearing was given to carriers generally, to state authorities, to various individuals to whom the statute was known to be applicable, and to the general public. The hearing was largely attended.

The term "carrier" as used in the statute embraces both operating and nonoperating railroad companies. It does not include carriers

¹ Thirty-sixth Annual Report of the Interstate Commerce Commission (1922), pp. 33-34.

by water or foreign carriers. A nonoperating company may be a carrier within the meaning of the statute, but not unless it was organized for the purpose of engaging in transportation by railroad subject to the act, and in determining the purpose for which it was organized the provisions of its charter declaring its corporate purposes and conferring its corporate powers will ordinarily be controlling.

We have had to pass upon several cases in which the office of general counsel, general solicitor, or general attorney of the carrier has been held not by an individual but by a firm. A partnership should not be regarded as an entity separate and distinct from the partners composing it. An office when held by a firm has been and will be considered as held jointly and severally by the partners. The statute applies to each partner in a firm which holds an office with more than one carrier; and is applicable also to a partner in a firm which holds an office with but one carrier, if he holds as an individual the position of officer or director of another carrier.

The evils which the statute was designed to prevent arose mainly from interlocking relationships between operating carriers. The majority of instances in which authority has been denied have related to operating carriers, especially where there has been substantial competition for traffic between the carriers.

The effect of the statute cannot be measured by the number of instances in which we have refused to grant authority. It was conceded by the railroad representatives present at the hearing mentioned above that as a general rule no persons should be authorized to serve carriers having conflicting interests. Undoubtedly many persons, prior to January 1, 1922, relinquished their positions with carriers to the extent made necessary by the statute. This is substantiated by the fact that comparatively few applications for authority to serve competing carriers have been filed with us.

Our regulations governing procedure in cases of this nature were revised by our order of June 19, 1922. Formerly, applications could be made either by interested carriers or by individuals. Under the revised regulations applications can be made only by the individuals concerned, and each application must be confined to one person. There is one exception. Where all the carriers involved may be regarded as parts of a single system, application may be made by an interested carrier in behalf of any number of persons for general authority to hold positions with any or all of the companies of the system.

We received 413 applications from individuals and 305 from carriers. There had previously been filed 17 applications by individuals and 14 by carriers, none of which had been disposed of. The total of 749 applications related to 2349 different individuals, and 1786 different carriers and companies. Seven individual applications and 3 carrier applications were withdrawn, 1 carrier application was wholly denied, and 408 individual applications and 308 carrier applications were granted in whole or in part, making a total of 727 applications, 415 individual and 312 carrier, of which disposition was made.

QUESTIONS

1. A and B are connecting railroads. X is a director of each. How might his holding such an office be detrimental to the public interest?

2. Y is president of railroad C, which runs from Chicago to St. Louis, and is a director of road D, which connects these points. Is the fact that he holds these offices necessarily detrimental to the public interest?

3. If the persons mentioned in Questions 1 and 2 desired in 1920 to continue to hold the offices described, what procedure was open to them?

4. What factors would tend to produce a favorable outcome to such procedure?

5. What abuses in railroad management is this section of the statute intended to correct?

5. TRANSACTIONS WITH CORPORATIONS OR FIRMS HAVING THE SAME OFFICERS

[A]

[The pertinent statutory provisions are found in Section 10 of the Clayton Antitrust Act (I. C. Act, pp. 145-146) and are quoted in part in [B], *infra*.]

[B]

Regulations Relative to Bids of Carriers (Ex Parte No. 54)

Interstate Commerce Commission (1920), 56 I. C. C. 847

It appearing; that Section 1 of "An Act to Supplement existing Laws against Unlawful Restraints and Monopolies, and for Other Purposes," approved October 15, 1914, hereinafter called the Clayton Antitrust Act, contains, among others, the following definitions:

"Commerce," as used herein, means trade or commerce among the several states and with foreign nations, or between the District of Columbia or any territory of the United States and any state, territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any state or territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country.

And it further appearing; that Section 10 of the said act provides :

That after two years from the approval of this act no common carrier engaged in commerce shall have any dealings in securities, supplies or other articles of commerce, or shall make or have any contracts for construction or maintenance of any kind, to the amount of more than \$50,000, in the aggregate, in any one year, with another corporation, firm, partnership or association when the said common carrier shall have upon its board of directors or as its president, manager or as its purchasing or selling officer, or agent in the particular transaction, any person who is at the same time a director, manager, or purchasing or selling officer of, or who has any substantial interest in, such other corporation, firm, partnership or association, unless and except such purchases shall be made from, or such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding under regulations to be prescribed by rule or otherwise by the Interstate Commerce Commission. No bid shall be received unless the name and address of the bidder or the names and addresses of the officers, directors and general managers thereof, if the bidder be a corporation, or of the members, if it be a partnership or firm, be given with the bid.

Any person who shall, directly or indirectly, do or attempt to do anything to prevent anyone from bidding or shall do any act to prevent free and fair competition among the bidders or those desiring to bid shall be punished as prescribed in this section in the case of an officer or director.

Every such common carrier having any such transactions or making any such purchases shall within thirty days after making the same file with the Interstate Commerce Commission a full and detailed statement of the transaction showing the manner of the competitive bidding, who were the bidders, and the names and addresses of the directors and officers of the corporations and the members of the firm or partnership bidding; and whenever the said Commission shall, after investigation or hearing, have reason to believe that the law has been violated in and about the said purchases or transactions it shall transmit all papers and documents and its own views or findings regarding the transaction to the Attorney General.

If any common carrier shall violate this section it shall be fined not exceeding \$25,000; and every such director, agent, manager or officer thereof who shall have knowingly voted for or directed the act constituting such violation or who shall have aided or abetted in such violation shall be deemed guilty of a misdemeanor and shall be fined not exceeding \$5000, or confined in jail not exceeding one year, or both, in the discretion of the court. (38 Stat. c. 323, p. 730.)

And it further appearing; that by Joint Resolution Congress extended the effective date of Section 10 to January 1, 1919, *except* as to corporations organized after January 8, 1918 (39 Stat. c. 427, p. 674; 39 Stat. c. 190, p. 1201; 40 Stat. c. 8, p. 431).

It is ordered; That the following regulations be, and they are hereby, prescribed to become effective on and after January 1, 1920, viz.;

1. When any carrier, subject to the Act to Regulate Commerce, is required by Section 10 of the Clayton Antitrust Act to call for bids for securities, supplies, or other articles of commerce, or for the construction or maintenance of any kind or part of its carrier property such carrier shall prepare specifications, form of proposals and contract, setting forth clearly and so far as applicable in each case in detail a description or descriptions of the matters and things for which bids are requested, the terms, times and conditions of delivery and payment, the place or places where delivery or performance is to be made, the character, amount, and terms of securities offered or sought, and a full description of the supplies or other articles required or offered for sale, hypothecation, or purchase, and shall make and attach to such specifications such maps, drawings and illustrations and state such other substantial facts or conditions as are or may be necessary to a full understanding of the premises and procedure by bidders. Such specifications, drawings and illustrations in each case shall be kept open

at the principal office or offices of the carrier for full examination, free of charge, by persons desiring to examine the same with a view to bidding, and, upon request, such carrier shall furnish to any person or persons desiring the same true and accurate copies of such specifications, maps, drawings and illustrations; *provided* that the carrier may make a charge for such copies so furnished, the charge not to exceed the reasonable cost of making and forwarding the copies requested.

The carrier shall publish in each case a request for bids in at least two daily newspapers of general circulation at least two publications in each week for two weeks, the first publication to be at least two weeks immediately preceding the day when the bids are to be submitted; one such newspaper shall be published or shall be of general circulation in the city or town where the principal operating office of the carrier is located and the other newspaper shall be published in one other of the following cities nearest to the operating or financial office of the carrier or the place where the contract is to be performed, namely: New York (New York), Boston (Massachusetts), Chicago (Illinois), St. Louis (Missouri), Atlanta (Georgia), San Francisco (California), and Portland (Oregon); and a printed copy of the published notice in each case shall be posted in plain view, for two weeks immediately preceding the day on which bids are to be received, on a bulletin board, designated for that purpose, in a public and conspicuous place in the building where the principal operating office of the carrier is located. Such published notices shall describe in general but intelligible terms the proposed contract, giving its serial number, and the special matter or things for which bids are requested, and the date on or before which the bids must be submitted, and the person by whom and the office at which the bids submitted will be received and opened as herein provided. The carrier may in said notice reserve the right to reject any and all bids and may, at its option, require each bidder to tender a bond in a reasonable sum to be therein named, with sufficient surety or sureties conditioned upon the faithful and prompt performance of the terms of the contract.

2. Every bid to receive consideration shall be submitted at the place specified in the notice on or before noon of the day on which the bids are to be opened and the bids shall be opened after noon and before six o'clock, on the day and at the place and by the person or persons designated in the notice. Each bidder may attend in person or by duly authorized representative at the opening of the bids, and shall be afforded an opportunity to do so and to examine each bid. The bids

shall forthwith be tabulated in conformity with the form of proposal prepared and a copy of such tabulation shall be promptly furnished to any bidder or his authorized representative upon application therefor.

When required by the notice, each bid shall be accompanied by tender of a bond in the amount specified in the notice with sufficient surety or sureties conditioned upon the faithful and prompt performance of the proposed contract. A bond shall be required only in cases where the notice for bids expressly calls for a bond.

Each bid shall be inclosed with accompanying papers in a plain envelope securely sealed bearing no indication of the name of the bidder or the amount of the bid, and shall be marked "Bid under proposed contract No. —," and shall be addressed to the officer of the carrier designated in the notice to receive the same.

Each bid shall state the name and address of the bidder and, if the bidder be a corporation, the names and addresses of the officers, directors and general manager thereof and of the purchasing or selling officer or agent in that transaction and, if the bidder is a firm, partnership or association, the bid shall give the names and addresses of each member thereof, and of the manager, purchasing or selling officer or agent in that transaction.

3. After receiving and opening bids as aforesaid, the carrier receiving the same shall within forty-eight hours in cases where the sale or purchase of securities is the undertaking, and within ten days where bids are for supplies, equipment, other articles of commerce and for construction or maintenance work, accept the most favorable bid considering (1) the lowest price or prices for the supplies, equipment, and other articles of commerce, and for the construction or maintenance work, described in the advertisement, and the highest price or prices offered for any securities or property, so described, for sale by the carrier, and (2) the ability and reliability of the bidder, financial and otherwise, to deliver the property or to perform the work or transaction, or to pay for the securities, described in the advertisement, giving due consideration to any bond or security tendered by the bidder. If the right be reserved in the notice all bids may be rejected and the carrier may readvertise for bids. The carrier shall notify the successful bidder of the acceptance of his or its bid, and the bidder shall within ten days execute the required contract, and, if required by the notice, execute a good and sufficient bond for the faithful and prompt performance of the contract. In case the successful bidder shall neglect

or fail within said time to execute the contract or bond as aforesaid the carrier may within five days award the contract to the next most favorable bidder, ascertained as herein provided for determining the most favorable bidder. If neither the most favorable bidder nor the next most favorable bidder shall execute a contract and qualify as aforesaid, the carrier shall readvertise for new bids.

4. Each carrier after having made and executed a contract as and in the manner above specified shall within thirty days after the execution of such contract file with the Interstate Commerce Commission a statement of the transaction giving, (a) a copy of the published notice; (b) the names of all bidders, and, if the bidder be a corporation, the names and addresses of the officers, directors and general managers thereof and of the purchasing or selling officer or agent in that transaction, or if the bidder be a partnership or firm, the names and addresses of the members of the firm, the general manager and purchasing or selling agent thereof, and the total amount of each bid; (c) the name of the bidder to whom the contract was awarded together with a copy of the contract; and (d) if any other than the lowest or the highest bid, as the case may be, is accepted as being most favorable to the carrier, the reasons for such acceptance. The statement shall be made in typewriting, in pamphlet form on pages not less than 8 by 10½ inches in size nor greater than 9½ by 12 inches, in size, bound on the longer edge of the page, the paper to be of durable quality fit for permanent record.

5. (*As amended October 4, 1920.*) In the case of each bid so taken as aforesaid, the carrier shall preserve and keep open for examination by the Interstate Commerce Commission or any duly authorized examiner thereof, (a) a copy of the resolution or order of the Board of Directors, Executive Committee, or officers of the said common carrier specifying the purposes and terms of the contract for which the bids were invited; (b) a copy of the specifications, maps, drawings, and illustrations upon which bids were made; (c) copies of the notices published, sworn to by or on behalf of the publisher of each paper, respectively, giving the dates and times of publication; (d) the original bids received, designating the bid accepted and giving a statement of the reasons for accepting the same; (e) a copy of the contract entered into between the carrier and the accepted bidder, together with a copy of the bonds if any; (f) references by number of volume and page to the records of proceedings of the stockholders, directors, or executive committee of the carrier. The files in each transaction

shall be securely fastened together and given the contract number and each document therein shall be numbered consecutively and at the conclusion there shall be a sworn statement by the president, a vice president, or the general manager of the carrier, stating that the files in No. — contain true and complete records and statements of all the negotiations had in connection with the contract therein set forth. Such files shall not be broken or any part destroyed by the carrier or any officer or agent of the carrier without written authorization from the Interstate Commerce Commission.

It is further ordered, That a copy of this order be served upon each common carrier subject to the Interstate Commerce Act, and that notice of this order be given to the general public by depositing a copy hereof in the office of the Secretary of the Commission in Washington, D.C.

BY THE COMMISSION.

[SEAL]

GEORGE B. MCGINTY
Secretary

QUESTIONS

1. What was the reason for adding the section quoted above to the Clayton Antitrust Act?
2. What difficulties might arise under the present regulation?
3. Would the fact of common ownership of the supplying and purchasing companies necessarily be detrimental to the public interest?
4. Why is the requirement made that requests for bids be published in at least two cities?
5. What changes in the method used by the carriers in disposing of securities does compliance with this provision involve?

6. COMMODITIES CLAUSE

[A]

[The pertinent statutory provisions are found in Section 1 of the Interstate Commerce Act, paragraph 8 (I. C. Act, p. 6).]

[B]

United States *v.* Lehigh Valley R. R. Co.

United States Supreme Court (1911), 220 U. S. 257

MR. CHIEF JUSTICE WHITE delivered the opinion of the court :

This case is one of what were known as the commodities cases previously decided and reported in *United States v. Delaware and Hudson Co.*, 213 U.S. 366. The controversy now is but a sequel to that disposed of in the previous cases. To understand the question now for consideration it is essential to have in mind the contentions which arose for decision upon the previous appeal and the disposition which was made of them. We therefore refer to those subjects.

The United States proceeded, both by suits in equity and mandamus, against certain railroad companies, including the Lehigh Valley, to prohibit them from transporting coal in interstate commerce in violation of what were deemed to be the prohibitions of the fifth paragraph of the first section of the Act to Regulate Commerce as amended on June 29, 1906, usually referred to as the commodities clause of the Hepburn Act. . . . [This is the provision of the Interstate Commerce Act referred to in [A], *supra*.]

In effect, the contention of the government was that the clause in question prohibited railroad companies from moving in the channels of interstate commerce articles or commodities other than the articles excepted by the provision which had been manufactured, mined or produced by the companies or under their authority or which were at the time of transportation owned by them or which had been previously owned by them in whole or in part or in which the companies then or previously had any interest, direct or indirect. The government, moreover, insisted that these general propositions embraced the movement by the companies in interstate commerce of a commodity which had been manufactured, mined or produced by a corporation in which the transporting railroad company was a stockholder, irrespective of the extent of such stock ownership. The railroad companies in effect defended the suits upon the ground that the statute as construed by the government was repugnant to the Constitution. . . .

As was done in the lower court, the cases here were all disposed of by one opinion, the facts in each case as summarized by the court below being stated. In deciding the cases it became necessary first to ascertain the meaning of the commodities clause. In performing this

duty the conclusion was reached that the clause did not have the far-reaching significance attributed to it by the government and which had been substantially adopted by the court below, but on the contrary had a much narrower meaning. Attention was directed to the fact that the statute disjunctively applied four generic prohibitions, that is, it forbade a railway company from transporting in interstate commerce articles or commodities (1) which it had manufactured, mined or produced; (2) which have been so mined, manufactured or produced under its authority; (3) which it owns in whole or in part; and (4) in which it has an interest, direct or indirect. All these prohibitions, however, were held to have but a common purpose, "that is, the dissociation of railroad companies prior to transportation from articles or commodities, whether the association resulted from manufacture, mining, production or ownership, or interest, direct or indirect."

In coming to determine whether the government was correct in its contention that these prohibitions operated to prevent a railroad company from transporting a product because it was owned by or had been mined, manufactured or produced by a corporation in which the railroad company was the owner of stock, irrespective of the amount of such stock ownership, it was expressly decided that the prohibitions of the statute were addressed only to a legal or equitable interest in the commodities to which the prohibitions referred, that they therefore did not prohibit a railroad company from transporting commodities mined, manufactured, produced or owned by a distinct corporation, merely because the railroad company was the owner of some or all of the stock in such corporation.

Summing up its review as to the true construction of the commodities clauses, the court held (p. 415) that it prohibited "a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) when the carrier owns the article or commodity to be transported in whole or in part; (c) when the carrier at the time of transportation has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined or produced or owned,

etc., by a *bona fide* corporation in which the railroad company is a stockholder."

Thus construed, the clause was held to be within the power of Congress to enact. As this conclusion rendered it necessary to reverse the action of the court below which had been exclusively predicated upon the unconstitutionality of the statute, the question arose as to what disposition should be made of the cases. That is to say, the constitutionality of the statute being settled and its true meaning being expounded, the question was whether the cases should be finally disposed of or should be left in such a position as to give the government the right to proceed to apply and enforce the prohibitions of the statute against the various corporations which were defendants if it deemed a good case existed for so doing. Disposing of this subject in the light of the consent upon which the cases had been tried in the court below, and of the error which had obtained as to the true meaning of the statute and of the consequent concentration of the attention of the court and of the parties to the question of the constitutionality of the statute, instead of its application to the facts, when correctly construed, it was determined that the decree should not conclude the right of the United States in the respective cases to further proceed to enforce the statute as construed, and hence that that subject should be left open for future action. . . .

Accordingly, the mandate of this court provided that the cause "be, and the same is hereby, remanded to the said circuit court for further proceedings in conformity with the opinion of this court."

Upon the filing of the mandate the court below vacated its decree dismissing the bill in this (the equity) cause, and reinstated the case upon the docket. The United States then presented an amended bill and asked leave to file it. The amendment contained copious averments in regard to the actual relations existing between the railroad company and one of the coal companies mentioned in the original bill, viz. the Lehigh Valley Coal Company. In substance it was averred that as to this particular coal company the railroad company was not only the owner of all the stock issued by the coal company, but that the railroad company so used the power thus resulting from its stock ownership as to deprive the coal company of all real, independent existence and to make it virtually but an agency or dependency or department of the railroad company. In other words, in great detail facts were averred which tended to establish that there was no distinction in practice between the coal company and the railroad com-

pany, the latter using the coal company as a mere device to enable the railroad company to violate the provisions of the commodities clause. It was expressly charged that in consequence of these facts :

The coal company is not a *bona fide* mining company, but is merely an adjunct or instrumentality of the defendant. The defendant is in legal effect the owner of and has a pecuniary interest in the coal mined by the coal company, and which is transported by the defendant.

Not only was it thus charged that the railroad company used its stock ownership to so commingle the operating of the affairs of the mining company with its own as to render it impossible to distinguish as a matter of fact between them, but it was moreover expressly in substance charged that exerting its influence as the owner of all the stock of the coal company the railroad company caused the coal company to buy up all the coal produced by other mining companies in the area tributary to the railroad and fix the price at which such coal was bought so as to control the same and the transportation thereof and establish the price at which the coal thus ostensibly acquired by the coal company by purchase should be sold when it reached the seaboard.

It was charged that by these abuses the production, shipment and sale of all coal within the territory served by the railroad company was brought within the domination of that company practically to the same extent as if it was the absolute owner of the same. Finally it was alleged as follows :

That by virtue of the facts hereinbefore set out and otherwise, and more particularly by virtue of the control, direction, domination, and supervision exercised by the persons who are the officers of the defendant railroad and by the defendant over all the operations of the said coal company, embracing the mining and production of said coal, the shipment and transportation of the same over the defendant railroad, and the sale thereof at the seaboard, it follows :

First. That the coal company, not being in substance and in good faith a *bona fide* corporation, separate from the defendant, but a mere adjunct or instrumentality of the defendant, the defendant, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in said coal.

Second. That said coal of said coal company is mined and produced under the authority of defendant, and the defendant at the time of transportation and before the act of transportation has not in good faith dissociated itself from all exercise of authority over said coal but continues to exercise authority over said coal at the time of transportation and over the subsequent sale thereof.

On the objection of the railroad company the court denied the request of the United States for leave to file the amended bill. The United

States then moved for a decree dismissing its original bill without prejudice, and after argument that motion also was denied. Thereupon counsel for the railroad company moved to dismiss the bill absolutely, and upon the statement of counsel for the United States that it "would not proceed any further in view of the fact that the proposed amendment had been disallowed," the court reached the conclusion "that the bill should be dismissed absolutely upon the allegations of the bill and answer." A decree to that effect was entered, and the government prosecutes this appeal, relying for reversal upon the error which it is insisted was committed in refusing to allow the proposed amended bill to be filed and in dismissing the suit. . . .

It remains only to consider, first, whether the proposed amendment was germane to the original cause of action, and if it was, whether it was foreclosed by our previous decision.

As to the first question. When it is borne in mind that the suit was brought by the government to enforce as against the defendant the commands of the commodities clause, the fact that the proposed amendment was germane to such cause of action is too apparent to need anything but statement. Indeed, in the argument at bar on behalf of the railroad company this is in effect conceded, since it is insisted that the amendment should not have been allowed, because in substance its averments virtually constituted part of the original cause of action. And we think it is equally clear that the grounds of the amendment were not foreclosed by our former decision. While that decision expressly held that stock ownership by a railroad company in a *bona fide* corporation, irrespective of the extent of such ownership, did not preclude a railroad company from transporting the commodities manufactured, mined, produced or owned by such corporation, nothing in that conclusion foreclosed the right of the government to question the power of a railroad company to transport in interstate commerce a commodity manufactured, mined, owned or produced by a corporation in which the railroad held stock and where the power of the railroad company as a stockholder was used to obliterate all distinctions between the two corporations. That is to say, where the power was exerted in such a manner as to so commingle the affairs of both as by necessary effect to make such affairs practically indistinguishable and therefore to cause both corporations to be one for all purposes. To what extent the amendment charged this to be the case will become manifest by again particularly considering its averments concerning the use by the railroad company of the coal company as a

purchaser of coal, as also the direct charge made in the proposed amendment that by such acts the railroad company was enabled to control all or a greater portion of the coal produced in the region tributary to its road, and thus to dominate the situation and fix the price, not only at which all the coal could be bought, but at which it could be sold at the seaboard for consumption.

That the facts thus averred and the other allegations contained in the proposed amended bill tended to show an actual control by the railroad company over the property of the coal company and an actual interest in such property beyond the mere interest which the railroad company would have had as a holder of stock in the coal company is, we think, clear. The alleged facts, therefore, brought the railroad company, so far as its right to carry the product of the coal company is concerned, within the general prohibitions of the commodities clause, unless for some reason the right of the railroad company to carry such product was not within the operation of that clause. The argument is that the railroad company was so excepted, because any control which it exerted or interest which it had in the product of the coal company resulted from its ownership of stock in that company, and would not have existed without such ownership. The error, however, lies in disregarding the fact that the allegations of the amended bill asserted the existence of a control by the railroad company over the coal corporation and its product, rendered possible, it is true, by the ownership of stock, but which was not the necessary result of a *bona fide* exercise of such ownership and which could only have arisen through the use by the railroad of its stock ownership for the purpose of giving it, the railroad company, as a corporation for its own corporate purposes, complete power over the affairs of the coal company, just as if the coal company were a mere department of the railroad. Indeed, such a situation could not have existed had the fact that the two corporations were separate and distinct legal entities been regarded in the administration of the affairs of the coal company. Granting this to be the case, however, it is in effect urged, as the railroad company held all the stock in the coal company, and therefore any gain made or loss suffered by that company would be sustained by the railroad company, no harm resulted from commingling the affairs of the two corporations and disregarding the fact that they were separate juridical beings, because ultimately considered they were one and the same. This, however, in substance but amounts to asserting that the direct prohibitions of the commodities clause ought to have been applied to a case

of stock ownership, particularly to a case where the ownership embraced all the stock of a producing company, and therefore that a mistake was committed by Congress in not including such stock ownership within the prohibitions of the commodities clause. We fail, however, to appreciate the relevancy of the contention. Our duty is to enforce the statute, and not to exclude from its prohibitions things which are properly embraced within them. Coming to discharge this duty it follows, in view of the express prohibitions of the commodities clause, it must be held that while the right of a railroad company as a stockholder to use its stock ownership for the purpose of a *bona fide* separate administration of the affairs of a corporation in which it has a stock interest may not be denied, the use of such stock ownership in substance for the purpose of destroying the entity of a producing, etc., corporation and of commingling its affairs in administration with the affairs of the railroad company, so as to make the two corporations virtually one, brings the railroad company so voluntarily acting as to such producing, etc., corporation within the prohibitions of the commodities clause. In other words, that by operation and effect of the commodities clause there is a duty cast upon a railroad company proposing to carry in interstate commerce the product of a producing, etc., corporation in which it has a stock interest not to abuse such power so as virtually to do by indirection that which the commodities clause prohibits, a duty which plainly would be violated by the unnecessary commingling of the affairs of the producing company with its own, so as to cause them to be one and inseparable.

Deciding, as we do, that error was committed in denying leave to file the proposed amended bill, the decree below is reversed and the cause remanded with directions for further proceedings in conformity with this opinion.

QUESTIONS

1. What evils was the commodity clause designed to remove?
2. In what particular fashion were those evils evident in the anthracite-coal industry?
3. A carrier claims that the exception in favor of timber and products thereof makes the commodities clause unconstitutional. Decide.
4. A wholesale grocery company owns a steamboat company which operates as a common carrier. Is the steamboat company precluded from carrying goods owned by the grocery firm?

5. A carrier owns a small amount of stock in a manufacturing company. Can it carry the product of the company?

6. A railroad company owning coal mines arranges to sell the products of its mines as soon as they are brought to the surface to a corporation which it has created. This corporation can purchase only from the railroad company, and is forced to purchase all the coal that the company shall tender to it. The price to be paid is arbitrarily fixed. Is this arrangement a violation of the commodities clause?

7. A carrier transports hay to be used for feeding animals in its coal mines. Seventy-five per cent of the product of the mines is sold to the public. Is this a violation of the commodities clause?

8. A mining company owns all the stock of a railroad over which its products are shipped before they are sold. Is this legal?

9. Coal produced by a mine owned by a railroad company subject to the Interstate Commerce Act is sold at the mouth of the mine, with the provision that the purchaser shall ship it over the lines of the railroad owner. The government claims this to be a violation of the commodities clause. Decide.

M. CONSOLIDATION

[A]

[The pertinent statutory provisions are found in Section 5 of the Interstate Commerce Act, paragraphs 4-8 (I. C. Act, pp. 18-20).]

[B¹]

Consolidation of Railroads

The spirit and intent of the legislation [the paragraphs of Section 5 cited above], as well as the manner in which it was anticipated that its ends would be attained, are significant. The sections above cited do not stand alone. They are integrally related to Section 15a, paragraph (2), of the Act to Regulate Commerce, as amended, which prescribes a new statutory rule of rate-making. . . . This new rule seeks to fix rates, not for any single carrier, but for the carriers by natural groups. By far the larger proportion of the traffic of the United States is carried by so-called strong or prosperous roads. But it is equally true that a large amount of mileage is in the hands of corporations

¹ Introduction (in part) to a Report to the Interstate Commerce Commission on Consolidation of Railways, by W. Z. Ripley (1921), 63 I. C. C. 476.

which, in a financial sense, may be denominated chronically weak. The causes for such weakness are various, including disadvantageous location, unwise investment or administration, and unwieldy financial structure, or even downright impairment of capital by waste or fraud. But, regardless of the sources of this disability these weak lines are as essential to the welfare of the communities which they serve as are the strong lines to their patrons. It is the theory of this legislation that the railways must be considered as a whole, group by group, fixing by means of the new statutory rule of rate-making, a general level of return adequate to maintain them all at a proper pitch of efficiency. . . .

To this end, the Senate bill sought to reduce the carrier corporations to a common denominator of earning power in terms of valuation by compulsory consolidation. It was intended to compel the stronger roads to merge their identity with the weaker ones for the common good of the country as a whole. But the measure ultimately emerged from the conference committee with the procedure as above described, in place of compulsion. It was evidently expected that the new statutory rule of rate-making would afford an incentive sufficiently powerful to induce the strong companies to merge with weaker ones, rather than to be compelled to pay over their surplus earnings above the rate of return fixed as reasonable, into a revolving fund for the general benefit of their respective groups. An incentive to the weaker roads might also conceivably obtain. The aid extended by the act from the surplus earnings of the strong roads consists merely of advances or loans, except in so far as a better balanced opportunity yields larger earnings. Or else possibly a fairer administration of the division of through rates may help. But the weaker roads are encouraged to seek shelter through affiliation. They are not taken care of by any definite guaranty of earnings. But the motive for consolidation, it was held, should not be permitted to bring about indiscriminate mergers, regardless of natural relationships of the carriers either to one another, or to the needs of their respective territories. It was in order that there might be consonance between such mergers as took place and the public welfare, rather than that mere immediate profit to those concerned might result, that the formal procedure as above described was enacted into law. Not otherwise, thus, than in its direct relationship to the fundamental principle of the new act can the significance of the particular consolidation provisions be understood. And it is because of this causal relationship that the act further

prescribes that no mergers which are not in accordance with this plan, as thus adopted, may lawfully take place.

As to procedure in undertaking this investigation, the leading paragraph of the statute, dealing with consolidation, above quoted, contains three requirements which must be observed. The first is that competition, presumably in service, shall be preserved; the second is that existing routes and channels of commerce shall not be disturbed; and the third, subject it will be noted, to the foregoing requirements, is that the financial aspects of such mergers shall be kept in view. Without having regard to the fundamental principle involved, both in consolidation and the new statutory rule of rate-making, it might appear that these several requirements were stated in the order of their importance; in other words, that the element of financial strength was less significant than the preservation of competition and of the existing traffic routes. But having due regard to the matter in its larger practical aspects, it is evident that any plan adopted will not only be a mere paper plan, ineffectual and futile, but that it will fail to conform to the spirit of the act, unless the financial requirements be given equal weight with those of operation and traffic. For the plan will never be put into effect unless a financial motive for consolidation be afforded; and unless it is put into effect, a positive bar to the attainment of uniform reasonable rates, under which all the carriers alike may thrive, will continue to exist, if the underlying principle of the legislation is in reality sound.

Assuming the three requirements for consolidation to be of equal importance, two quite distinct methods of approach might be adopted according as one began at the operating and traffic end, or, on the other hand, began with the financial aspects of the matter. Under normal conditions these two methods seemingly promise results of equal value. One might, presumably, first ascertain the relative financial standing of the corporations; and thereafter check up the alliances thus indicated, by applying the test of operating efficiency and satisfaction of the traffic needs of the territories concerned. Or, contrariwise, one might first seek the natural alignment of these properties as operating and traffic units, before inquiry as to whether such alignment contained an effective invitation to merger, based upon considerations of earning power and financial stability. The former method appeals particularly to financial students of the subject. It has resulted in the formulation of several significant proposals. The latter calls for a somewhat wider range of information, dealing

not alone, as it does, with the operating and traffic characteristics of the carrier companies, but also looking to the broader considerations of the traffic needs of the entire communities served. For it is held that the maintenance of the "existing routes and channels of trade and commerce" implies not the preservation of merely artificial currents and conditions, but that the statute contains an invitation to consider these carrier corporations in their basic relationship to the welfare, present and prospective, of the country. Viewed in this larger sense the act is at once an invitation and an opportunity. It calls for an analysis of the commercial geography of the United States, in its relation to the layout of its railway net. For, unless the location of its railways conforms to the commercial requirements of the country, there can be no permanent prosperity for either. The further requirement in the act for a certificate of public exigency for proposed new construction of railways is but another expression of this intent in the law. . . .

Certain statistical data have been compiled . . . in order to check up the plan, as proposed, by territories and by systems, respectively. . . .

The . . . data for class I roads, including their subsidiaries, as segregated by systems set up under this plan, afford a rough indication of the competitive strength, geographic scope, and inherent financial stability of the relationships proposed. But it is evident that such data constitute merely a rough check upon the plan. The figures are no more to be trusted implicitly than are seductive maps nicely fashioned to produce the effect of symmetry upon paper. Such symmetry, until it be checked up and tested in detail for all manner of traffic and operating conditions, may be grossly misleading. Statistics, as well as maps, under these given conditions must be regarded and treated as imperfect criteria. The realignment of properties, with the consequent disturbance of all traffic, is bound to be instantly reflected in earning power. The putting together or dismemberment of individual properties may bring about results which are quite unpredictable by the arbitrary means of statistical investigation. Elaborate calculations by experts concerning the development of business under the new conditions are really necessary in order to afford a reliable forecast. Not published statistics, but rather an intimate acquaintance with local traffic conditions afford the only entirely reliable data. . . .

What test shall be applied in order to ascertain competitive ability; that is to say, ability to prosper reasonably along with other railroads in the same group under a uniform set of rates? Do the requirements

of the statute call for the creation of systems of substantially equal mileage or enjoying much the same volume of gross earnings or net income from operation? Shall one seek to construct comprehensive groups conforming to one or several of these standards, or may one assume that size, as thus indicated, is merely of secondary importance? It has been urged with some cogency that this plan does not call for widespread disturbance of existing relationships except to take care of the properties that are either well above par or substantially below it. In other words, it has been urged on behalf of several properties of moderate size that they are already doing fairly well under the statute, conforming to the requirements and enjoying the reasonable return fixed by the Commission without further alliance with other companies. One has to decide as to such claims, and particularly must one decide where to draw the line in the search for uniformity in magnitude. Deciding roughly, as one must under existing conditions, it is held to be more important to create self-sustaining systems as to earnings derived from as large a proportion as possible of the area of the several great subdivisions of the country, rather than to attempt to put these properties together in such an exact way that they shall all have approximately equal mileage or equal gross or net earnings within each group. Neither mileage nor volume of business is the real test of ability to exist under the statute. . . .

The dynamic aspect of consolidation must also be kept in mind. The purpose being to promote a more evenly balanced competition, especially by means of equalization of opportunity in originating traffic as well as in its interchange and delivery, it is conceivable that congestion may be in a measure relieved by this plan. The growth of business in future years must accrue largely to the existing stems. Sound public policy demands that this growth should be so distributed as to avoid blockades and embargoes on the strong roads, while the weak ones are coincidently drifting toward starvation. To insure a larger proportion of the increment to the weaker roads, by rendering them more capable of efficient service, is the idea. The purpose of the legislation being not to guarantee an income but to afford an equality of opportunity to earn it, was intended to be promoted by this means.

Fundamental differences between various plans proposed for consolidation arise concerning the size and scope of the mergers. Shall they be continental in range, reaching, that is to say, clear across the country, from east to west, and from Canada to the Gulf; or shall they conform to the territorial divisions of the country? Considerations of

operating efficiency and of conformity to the traffic needs of the country, as well as preservation of competition and of the established channels of trade and commerce, are not sufficient. It is essential also that administrative organization both within the company and in its relations to the government should be likewise comprehended. Particularly is it important that correspondence be maintained between the scope of these railroad systems and the long-standing rate-making areas and statistical divisions which have commended themselves upon the basis of long experience to the parties concerned. All these considerations join in commending a division of the country for purposes of consolidation primarily into the great subdivisions of trunk line territory. . . .

The new statutory rule of rate-making and the first decision rendered thereunder by the Interstate Commerce Commission — Ex parte 74 — also render it imperative in planning for comprehensive consolidation not to transgress the boundaries of these traditional territorial subdivisions. The purpose of the law being to fix reasonable rates, not for individual railroads but for entire groups, renders it essential that the grouping adopted for this purpose conform to that which is adopted in effecting the consolidations. Otherwise confusion in the administration of the new law would be bound to result. . . .

This tentative plan for consolidation proceeds upon the assumption that the distinction between so-called weak and strong roads, financially, is at present highly uncertain; and that it will require a period of experience under the new rates and under the new division of through rates as well as under the slowly readjusted commercial and industrial conditions after the war, in order to establish the relative earning power and credit of each. A period of trial is often necessary, both to reveal elements of strength and of weakness. Substantial equilibrium seems unlikely to be attained for a considerable period of time. Yet in the meanwhile, tentative plans must be set up, in preparation for the application of the final test of relative financial strength as soon as the available data make this possible. Not infrequently it will be found that in these plans it has been necessary to put together what appears to be a disproportionate number of weak roads, or at all events, of roads which have yet to establish their claim to entire stability. Particularly has this been the case in the so-called Gulf region, where practically all the properties seem to be below par. No strong roads exist with which these may be consolidated, without extension of the scope of consolidation far beyond the bounds which are apparently laid down

by traffic and operating experience. The same condition would obtain under the so-called New England plan for that particular territory, as well as for the peninsula of Michigan. The assumption is thus made that the purpose of this act being to rehabilitate the carriers through a new definition of reasonable rates, these entire groups of roads may be expected to prosper, to a degree as yet not ascertained, but none the less to a substantial amount. Whether this rehabilitation will ultimately warrant the grouping herein tentatively proposed, the future alone can decide. But necessarily the first step must be to provide for proper grouping in order to promote the best operating and traffic results. The responsibility for the subsequent financial success of the undertakings must then rest upon the exercise of the new rate-making powers, conferred upon the Interstate Commerce Commission by the act.

A peculiar difficulty in effecting consolidation of strong with weak roads and of reconciling such merger with existing operating and traffic relationships, arises from the tendency of the weak roads to link up in series and to form thereby through routes extending sometimes clear across the country. . . . Under such circumstances the mandate of the statute, to preserve "as fully as possible and wherever practicable" such traffic associations, impels one of necessity toward consolidation of a number of equally substandard roads. Conformity with the other mandate of the statute by seeking to ally strong and weak properties to a like degree, thus threatens to overstep the traffic relationships which have become customarily established by very force of circumstances. It is because of the clash between these at times discordant requirements, that the emergent result is so often a piebald compromise.

Several assumptions akin to the foregoing one are made in the following plan. The first is that for a number of roads a substantial readjustment of capitalization must occur as a prerequisite for consolidation. . . .

It is likewise presupposed throughout this report that all the new powers conferred upon the Interstate Commerce Commission by the Transportation Act, 1920, will be upheld constitutionally. An entire transformation in the relation between this administrative branch of the government and the judicial arm has been brought about. Sporadic control by the courts, as evidenced in the pending dissolution proceedings concerning the Central Pacific and Southern Pacific companies and the Philadelphia & Reading and Central of New Jersey, it is

assumed now yields place to a continuing supervision and control by the Interstate Commerce Commission, acting as a branch of the executive authority. Such a complete reversal of public policy must lead to protracted litigation; but regardless of the final outcome no course in connection with this report is possible save to hold that the will of Congress as expressed in the Transportation Act is governing and supreme. Not even judicial decisions under the Sherman act or the commodity clause of the Act to Regulate Commerce are held to constitute a bar to the free allocation of these properties to the new systems provided by this plan. All the roads concerned in such proceedings are therefore treated with entire freedom, assuming that the final decision as to the propriety of such placement will rest in the future not with the courts but with the Interstate Commerce Commission.

Another far-reaching assumption is vital to the success of this plan. This has to do with the operation of terminals at great centers. Historically, there has been the greatest diversity of experience in this regard between the carriers of the country. Some roads are peculiarly fortified as to terminals, while possessing weak lines from an operating standpoint across the open country. For others, the reverse is true. Some companies, entering the field late, enjoy good locations as to line, but have always worked under a handicap at the terminals. Such lines are strong in the open but weak at the ends. . . . It is submitted that a proper adjustment of the various terminal situations, always of course for due compensation, is an important adjunct to any comprehensive consolidation plan. . . . Consolidation can never be effectively brought about without the adoption of a comprehensive policy as to terminal ownership, operation, or both. It is herein assumed that free access will be somehow provided, either under the present emergency powers as contained in Section 1, paragraph 15c, or by the adoption under a consolidation plan of permanent arrangements in all of the important centers. Possibly the assignment of terminal properties might take place by means of leases based upon valuation by the Commission and at a rate fixed by the Commission as reasonable. This would permit the terminal companies to remain under the joint control of the several participating railroads, rather than that entirely independent terminal companies, actually owning these facilities, should be set up. The important point, whatever the means adopted to this end, is that there should be unified operation and entirely free access to all participants alike.

Another general principle constantly kept in mind in connection with consolidation and having substantial effect upon it is the encouragement of alternative routes and gateways, in order to relieve present or prospective congestion at the great railway meeting points. . . .

The preparation of such a plan of consolidation thus affords a unique opportunity for the evolution of a comprehensive plan for the development of national resources. Too often in the past purely temporary or personal considerations of advantage or profit have determined the location of our American railways. The administrative control of the terms on which the carrier companies may be allowed further to ally themselves in the future may, if wisely administered, contribute to diminish economic waste and to promote commercial development. But such wise administration demands a comprehensive plan adopted in advance, and it is evidently the purpose of the act to draw up this plan, not alone for the attainment of the immediate rate-making end but also with a view to the larger purpose of a right direction of our economic resources as a nation in the years to come.

QUESTIONS

1. Summarize the results that may be obtained from the general plan of consolidation as outlined in this section.

2. Is there a possibility that under this section there will be consolidations disadvantageous to the general public? to an individual railroad?

3. Which of the three requirements to be observed by the consolidations seems the most important?

4. "Better financial conditions among the roads of the country are a necessity if adequate transportation service is to be rendered. The financial aspects of consolidation should therefore be the guide in putting any plan into effect." Criticize.

5. Is competition among railroads necessary according to the statute? Is it necessary from the point of view of economics?

6. Why was consolidation made voluntary? Has a compulsory consolidation program any advantages?

7. Why is a readjustment of capitalization necessary for the success of the plan?

8. What means for securing "free and untrammelled utilization of terminals" might be suggested?

9. "The final decision as to the legality of consolidations will rest in the future not with the courts, but with the Interstate Commerce Commission." What justification is there for such a statement?

[C¹]*Consolidation of Railroads*

In our last report it was noted that the work of preparing the complete plan of consolidation was progressing. On February 4, 1925, we addressed a letter to the chairman of the Senate Committee on Interstate Commerce, in which the majority of the Commission expressed doubt as to the wisdom of the provisions of the law which now require us to adopt a complete plan to which all future consolidations must conform. They further stated that they had been impelled to the belief that results as good, and perhaps better, are likely to be accomplished with less loss of time if the process of consolidation is permitted to develop, under the guidance of the Commission, in a more normal way. A proposed amendment to Section 5 of the Interstate Commerce Act was attached to the letter.

The following explanation of the proposed amendment is quoted from the letter :

Briefly the amendment would accomplish the following results :

(1) Relieve the Commission from its present duty of adopting a complete plan of consolidation.

(2) Make unlawful any consolidation or acquisition of the control of one carrier by another in any manner whatsoever, except with the specific approval and authorization of the Commission. The purpose of this provision is to make certain that the process of consolidation will in all respects be subject to the control and guidance of Federal authority. Without such a prohibition it will be claimed that such consolidations or acquisitions of control as are not in conflict with the Federal antitrust laws may be effected, as was done in the Nickel Plate case, under state authority and without Federal approval. Whatever the merits of the Nickel Plate consolidation, it must be obvious that the possibility of consolidations or acquisitions of control thus consummated means a division of authority and responsibility which is likely to be destructive of any well-ordered and consistent control of the process of consolidation in the public interest.

(3) Give the Commission broad power to approve or disapprove such consolidations or acquisitions of control as are proposed. Before approving the Commission must find that the consolidation or acquisition

(a) Will be in the interest of better service to the public, or economy in operation ;

(b) Will not unduly restrain competition or be in any other material respect inconsistent with the public interest ; and

¹ Thirty-ninth Annual Report of the Interstate Commerce Commission (1925), pp. 13-14.

(c) Will conform to the provisions of paragraph (4), which prohibit a capitalization of the consolidated company in excess of property value.

It may seem unduly drastic to require a finding that the consolidation or acquisition will not be inconsistent with the public interest in any material respect, but it will be noted that the Commission is not restricted to the approval or disapproval of the consolidation or acquisition as proposed, but is authorized to approve "with such modifications and upon such terms and conditions" as it shall find just and reasonable. If what is proposed will promote the public interest in certain respects but not in others, it need not be wholly rejected but may be approved in a modified form which will eliminate the objectionable features.

(4) The Commission is specifically authorized to disapprove a consolidation or acquisition upon the ground that it does not include a carrier, or all or any part of its property, which ought to be included in the public interest and which it is possible to include upon reasonable terms. One of the criticisms of such consolidations or acquisitions as have been proposed or suggested has been that they do not take care of the weak lines, although the merger of weak with strong lines is one of the ends which Congress has apparently had in mind. The specific provision above described will, it is thought, enable the Commission to require attention to be directed to this phase of the matter, which otherwise might be neglected. The Commission is also specifically authorized to make it a condition of any consolidation or acquisition that "existing routes and channels of trade and commerce shall be maintained." This provision has been inserted to remove such doubts as have been raised with respect to our power to attach such a condition.

(5) The Commission is required to preserve "all records and other evidence heretofore taken and now in the files of the Commission, under the terms of this section as heretofore enacted" and is authorized to utilize such records and evidence in reaching its conclusions with respect to any consolidation or acquisition proposed. This provision will enable the Commission to avail itself of the very valuable information which has been gathered in connection with the consolidation-plan proceeding.

(6) The provision now subparagraph (b) of paragraph (6) of Section 5 has been retained in somewhat modified form. This is the provision which limits the total capitalization of the consolidated company to the value of the combined properties. The thought underlying the modification is that it may be possible to determine value for the purposes of this provision more expeditiously than is possible under the valuation procedure prescribed in Section 19a. It should be understood, however, that even with this modification this provision is likely to cause material delay in the process of consolidation. The safeguard provided by the provision is a desirable one and the question which must be faced is whether delay in accomplishing consolidations is more objectionable than the absence of such a safeguard.

QUESTIONS

1. Why does the Commission not wish to adopt a complete plan of consolidation?
2. What advantages would come from the drawing up and the adoption of such a plan?
3. Why does the Commission need more complete power over the acquisition of the control of one road by another?
4. Which is more important: capitalization not exceeding the value of the consolidated roads or speedy consolidation? Are both impossible?
5. What justification is there for bringing pressure to bear in order to force the inclusion of a weak road in a union of profitable ones?
6. It is proposed that the Commission be given authority to compel consolidations. Under what powers could Congress force consolidations? Would such a procedure be advantageous to the railroads? to the public?
7. What relationship does the process of acquisition of control over one carrier by another under paragraph (2) of Section 5 bear to the consolidation problem?
8. Outline the progress of unification among the railroads of the country.
9. Does the progress up to the present conform to, or conflict with, the Commission's tentative plan for consolidation?

N. REGULATION OF SAFETY AND HEALTH

1. REGULATION APPLYING TO EQUIPMENT

[A]

[The pertinent statutory provisions are contained in the Safety Appliance Acts, in the Ash Pan Act, in the Boiler Inspection Act, in the Block Signal Resolution, and in Section 26 of the Interstate Commerce Act (I. C. Act, pp. 198-206, 212-213, 217-224, 79-80).]

[B]

Chicago, Burlington, & Quincy Railway Company *v.*
United States

United States Supreme Court (1911), 220 U.S. 559

MR. JUSTICE HARLAN delivered the opinion of the court:

Two separate actions were brought by the government in the district court of the United States for the district of Nebraska, against

the Chicago, Burlington, & Quincy Railroad Company, an Iowa corporation engaged as a common carrier in interstate commerce. The object of each action was to recover certain penalties which, the United States alleged, had been incurred by the company for violations, in several specified instances, of the safety-appliance acts of Congress. . . . By consent of the parties and by order of court, the two actions were consolidated and tried together. At the trial the court directed a verdict of guilty as to each cause of action, and a judgment for \$300 was rendered for the government in one case and for \$100 in the other. . . .

After referring to various cases holding that the omission of Congress to make knowledge and diligence on the part of the carrier ingredients of the act condemned, the trial court said :

Its omission was intentional, in order that this statute might induce such a high degree of care and diligence on the part of the railway company as to necessitate a change in the manner of inspecting appliances, and to protect the lives and the safety of its employees, provided the accident occurs from a defective appliance such as is designated in this act. And for these reasons the jury will be peremptorily instructed to return a verdict for the government on each count of the petition. (156 Fed. 182.)

In the circuit court of appeals that judgment was affirmed. In the course of its opinion the latter court said :

The cause is simplified by the concession of counsel for the railway company that there was evidence tending to prove the defective condition of each of the four cars as charged, and that they were all being used at the time stated in the several counts in hauling interstate commerce, or as a part of a train containing other cars which were doing so. The sole contention is that, notwithstanding this concession, inasmuch as it appears by the proof that defendant did not know its cars were out of repair, and had no actual intention at the time to violate the law, but, on the contrary, had exercised reasonable care to keep them in repair by the usual inspections, it is not liable in this action. . . .

The act made it unlawful for railroads to use cars not equipped as therein provided, and thereby imposed a duty upon railroad companies to equip cars accordingly. This was, by clear and unequivocal language of the lawmaker, made an absolute duty, not dependable upon the exercise of diligence or the existence of any wrong intent on the part of the railroad companies. Whether a defendant carrier knew its cars were out of order or not is immaterial. Its duty was to know they were in order and kept in order at all times. A breach of this duty, like the breach of most civil duties, naturally entailed a liability, and Congress fixed that liability, not as a punishment for a criminal offense, but as a civil consequence, so far as the government was concerned, of a failure to perform the duty which, in the opinion of Congress, the public weal demanded should be performed by railroad companies. 170 Fed. 556.

Does the act of Congress in question inpose on an interstate carrier an absolute duty to see to it that no car is hauled or permitted to be hauled or used on its line unless it be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars? Can the carrier engaged in moving interstate traffic escape the penalty prescribed for a violation of the act, in the particulars just mentioned, by showing that it had exercised reasonable care in equipping its cars with the required coupler, and had used due diligence to ascertain, from time to time, whether such cars were properly equipped?

The court below held that an explicit answer to the above questions was to be found in *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U.S. 281. The government insists that such was the effect of the decision of that case. The defendant contends that the questions here presented were not necessary to be decided in the *Taylor* case, and that an examination of them now is not precluded by anything involved in that case. . . .

What, then, was held by this court in the *Taylor* case? Among other things, the court said :

On this state of the evidence the defendant was refused instructions, in substance, that if the defendant furnished cars which were constructed with drawbars of a standard height, and furnished shims to competent inspectors and trainmen, and used reasonable care to keep the drawbars at a reasonable height, it had complied with its statutory duty, and, if the lowering of the drawbar resulted from the failure to use the shims, that was the negligence of a fellow servant, for which the defendant was not responsible. In deciding the questions thus raised, upon which the courts have differed, we need not enter into the wilderness of cases upon the common-law duty of the employer to use reasonable care to furnish his employee reasonably safe tools, machinery, and appliances, or consider when and how far that duty may be performed by delegating it to suitable persons for whose default the employer is not responsible. In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, *not satisfied with the common-law duty and its resulting liability*, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was *to supplant the qualified duty of the common law with an absolute duty deemed by it more just*. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make

compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. *They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. . . .* It is quite conceivable that Congress, contemplating the inevitable hardship of such injuries, and hoping to diminish the economic loss to the community resulting from them, should deem it wise to impose their burdens upon those who could measurably control their causes, instead of upon those who are in the main helpless in that regard. Such a policy would be intelligible, and, to say the least, not so unreasonable as to require us to doubt that it was intended, and to seek some unnatural interpretation of common words. We see no error in this part of the case. . . .

It cannot then be doubted that this court in the Taylor case considered the scope and effect of the Safety Appliance Act of Congress as directly involved in the questions raised in that case, and it expressly decided that the provision in the second section relating to automatic couplers imposed an absolute duty on each corporation in every case to provide the required couplers on cars used in interstate traffic. It also decided that nonperformance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them and ascertaining their condition from time to time. . . .

In view of these facts, we are unwilling to regard the question as to the meaning and scope of the Safety Appliance Act, so far as it relates to automatic couplers on trains moving interstate traffic, as open to further discussion here. If the court was wrong in the Taylor case, the way is open for such an amendment of the statute as Congress may, in its discretion, deem proper. This court ought not now disturb what has been so widely accepted and acted upon by the courts as having been decided in that case. A contrary course would cause infinite uncertainty, if not mischief, in the administration of the law in the Federal courts. To avoid misapprehension, it is appropriate to say that we are not to be understood as questioning the soundness of the interpretation heretofore placed by this court upon the Safety Appliance Act. We only mean to say that until Congress, by an amendment of the statute, changes the rule announced in the Taylor case, this court will adhere to and apply that rule.

The Taylor case was a strictly civil proceeding, being an action by an individual to recover damages for a personal injury alleged to have been caused by the negligence of a corporation: whereas, the present

action is to recover a penalty. This difference, it is suggested, will justify a reëxamination, upon principle, of the rule announced in the Taylor case. In effect, the contention is that the present action for a penalty is a criminal prosecution, and that the defendant cannot be held guilty of a crime when it had not thought or purpose to commit a crime, and endeavored with due diligence to obey the act of Congress. This contention is unsound, because the present action is a civil one. It is settled law that "a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal." . . . If the statute upon which the present action is based had expressly or by implication declared that the penalty prescribed may only be recovered by a criminal proceeding, that direction must have been followed. The power of the legislature to declare an offense, and to exclude the elements of knowledge and due diligence from any inquiry as to its commission, cannot, we think, be questioned. . . . In *Halsted v. State*, 41 N. J. L. 552, 591, the suggestion was made that, in determining the mind of the legislature, the dictates of natural justice should be the ground of decision, and not simply regarded as a mere circumstance of weight. But that court said :

As there is an undoubted competency in the lawmaker to declare an act criminal, irrespective of the knowledge or motive of the doer of such act, there can be, of necessity, no judicial authority having the power to require, in the enforcement of the law, such knowledge or motive to be shown. In such instances the entire function of the court is to find out the intention of the legislature, and to enforce the law in absolute conformity to such intention.

So, in *Greenleaf on Evidence* :

Where a statute commands that an act be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems, will not excuse its violation. Thus, for example, where the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred, notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police, and other laws and regulations for the mere violation of which, irrespective of the motives or knowledge of the party, certain penalties are enacted ; for the law, in these cases, seems to bind the party to know the facts and to obey the law at his peril. 3 *Greenl.*, 16th ed., sections 21, 26, and notes.

We need say nothing more. The case is plainly covered by the act of Congress. And as it is determined by the rule announced in the Taylor case, it must be held that no error of law was committed to the prejudice of the defendant, and the judgment must be affirmed.

It is so ordered.

[C]

Napier *v.* Atlantic Coast Line Railroad Company

United States Supreme Court (1926), 272 U.S. 605

MR. JUSTICE BRANDEIS delivered the opinion of the court :

These cases require a determination of the scope and effect of the Federal Locomotive Boiler Inspection Act. February 17, 1911, c. 103, 36 Stat. 913, as amended March 4, 1915, c. 169, 38 Stat. 1192, and June 7, 1924, c. 355, 43 Stat. 659. The main question, which is the same in the three cases, is one of statutory construction. It is whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so. . . .

No. 87 involves a Georgia statute which prescribes an automatic door to the fire-box, act of August 13, 1924, Georgia Laws, 1924, p. 173. That case is here on direct appeal from a final decree of the Federal district court, entered December 23, 1924, granting the injunction. 2 Fed. (2d) 891. Nos. 310 and 311 involve a Wisconsin statute which prescribes a cab curtain, Wisconsin Statutes, Section 1806a, c. 139, Laws of 1923. These cases are here on writs of error to the Supreme Court of that state, which affirmed a judgment denying the injunction. 188 Wis. 232. In Georgia, the details of the device were prescribed by the legislature. In Wisconsin, the specifications were prescribed by an order of the state railroad commission. In each case, an interstate carrier sought to enjoin state officials from enforcing, in respect to locomotives used on its lines, a state law which prohibits use within the state of locomotives not equipped with the device prescribed. Some of the engines were being operated entirely within the state, some across the state line to and from adjoining states. It is conceded that the Federal Safety Appliance and Boiler Inspection Acts apply to a locomotive used on a highway of interstate commerce, even if it is operated wholly within one state and is not engaged in hauling interstate freight or passengers. *Southern Ry. Co. v. United States*, 222 U.S. 20; *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33.

Prior to the passage of the Boiler Inspection Act, Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce. It had required a power driving-wheel brake, automatic couplers, grabirons or handholds, drawbars, safety ash pans, and sill steps. . . . Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment in 1911. The original act applied only to the boiler. It is entitled: "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." The provisions of that act were extended in 1915 to "include the entire locomotive and tender and all parts and appurtenances thereof." In 1924, Section 2 of the original act was amended to read as [it appears in the pages referred to in [A], *supra*]. . . .

From time to time since the passage of the original act, the Commission has required that locomotives used in interstate commerce be equipped with various devices. But it has made no order requiring either a particular type of fire-box door or a cab curtain. Nor has Congress legislated specifically in respect to either device.

The Georgia Act provides that the "automatic door shall be so constructed and operated by steam, compressed air or electricity, as deemed best and most efficient by officers of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of said engine by means of a push-button or other appliance located on the floor of the engine deck or floor of the tender . . . to enable the fireman while firing such engine by pressure with his feet to operate such door for firing of such engine." The automatic fire-door conserves the health of the fireman by protecting him from exposures to extremes of heat and cold while performing his duties; conserves his eyesight by reducing the amount and extent of exposure to the glare of the fire; protects the safety of the employees in the event of an explosion in the fire-box; and incidentally might affect the safety of the train, after such an explosion, in that employees, being safe, might be able to bring the train under control. The automatic fire-door would also serve to protect travelers upon highways crossed by the railroad at grade. For the fireman is required to aid the engineer in keeping a lookout; and with use of the old-type swinging door this is not continuously possible. The glare of the flame when the door is open practically blinds the fireman for a time.

The purpose of the cab curtain is to protect engineers and firemen from the weather during the winter season. The act made it unlawful to use "between the fifteenth day of November and the first day of April of each year any locomotive engine not equipped with suitable and approved cab curtains. Such curtains shall be so constructed as to efficiently inclose the openings between the engine cab and the water tank or coal tender attached to such locomotive engine. The windows of the cab shall be properly and closely fitted and all openings for levers or pipes and all other openings whatsoever through which cold or drafts may bring discomfort to the occupants, shall be efficiently protected in such manner as may be required and according to plans approved by the Railroad Commission." Various types of cab curtains had been voluntarily installed by the carriers. But those installed by most of the carriers were such that snow entered the cabs in large quantities; that it saturated the clothing of engineers and firemen; and that the exposure caused great discomfort and danger of serious illness. The State Commission found that the plans for cab curtains submitted by the several carriers were, with one exception, not "fully suitable and effective for the protection of the health, comfort and welfare of the enginemen"; and ordered particular requirements.

Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause. It may be assumed, also, that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude states from exerting their police power must be clearly manifested. *Reid v. Colorado*, 187 U.S. 137, 148; *Savage v. Jones*, 225 U.S. 501, 533. Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U.S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.

The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire-door and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind (*Baltimore & Ohio R. R. Co. v. Groeger*, 266 U.S. 521); and that Congress has definitely reserved that power to itself (*Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U.S. 479; *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U.S. 280; *United States v. Pennsylvania R. R. Co.*, 242 U.S. 208). The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in *Vandalia R. R. Co. v. Public Service Commission*, 242 U.S. 255. We think that power was conferred. The duty of the Commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not "in proper condition" for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the Federal and the state laws are aimed at distinct and different evils; that the Federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

The Federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same subject. It is suggested that the power delegated to the Commission has

been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic fire-box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the states are precluded, however commendable or however different their purpose. . . .

If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service.

In No. 87, decree affirmed.

In Nos. 310 and 311, judgment reversed.

QUESTIONS

1. By what power may the states make safety-appliance regulations affecting intrastate carriers?

2. May Congress exercise the same power in passing safety regulations applying to interstate commerce?

3. Do such provisions infringe upon the police powers that are reserved to the states?

4. Is it fair to hold a carrier responsible for violations of safety laws even if it has used "due care" to comply with them?

5. In 1907 a railroad which was a part of a through interstate route hauled five cars the couplers of which were defective and inoperative. Two of the cars were moving interstate traffic and three of them were moving intrastate traffic. The government contends that under the Safety Appliance Act the railroad was subject to a fine on all five cars. Decide.

6. A state statute requires that, as a safety measure, locomotives shall be provided with electric headlights. The statute is alleged in 1914 to be unconstitutional. Decide.

7. A terminal company receives from a railroad a car not equipped with automatic couplers. While handling the car an employee of the terminal company is injured. Damages are paid to the employee by the terminal company, which seeks to recover from the railroad company. Decide.

8. In Section 5 of the first Safety Appliance Act, Congress authorizes the American Railway Association to set certain standards. It is alleged that Congress in so delegating authority exceeds its power. Decide.

9. "Avoidance of accident through the use of proper safety appliances is dictated to the roads by their own self-interest. Hence legislative safety regulations are unnecessary and may be harmful." Is such an argument valid?

10. What may the states require relative to safety regulations connected with train equipment?

2. REGULATIONS LIMITING THE WORKING HOURS OF EMPLOYEES

[A]

[The pertinent statutory provisions are found in the Hours of Service Act of March 4, 1907, as amended by the act of May 4, 1916 (I. C. Act, pp. 210-212).]

[B]

Baltimore & Ohio Railroad Company *v.* Interstate Commerce Commission

United States Supreme Court (1911), 221 U.S. 612

MR. JUSTICE HUGHES delivered the opinion of the court :

This is a bill in equity to annul an order made by the Interstate Commerce Commission on March 3, 1908, and for injunction. The order required the carriers within the provisions of the act of Congress of March 4, 1907, chapter 2939, 34 Stat. at L. 1415, to make monthly reports, under oath, showing the instances where employees subject to that act had been on duty for a longer period than that allowed. . . .

First. Although the question was not specifically raised by the bill, it is now contended that the statute is unconstitutional in its entirety, and therefore no action of the Commission can be based upon it. It is said that it goes beyond the power which Congress may exercise in the regulation of interstate commerce; that while addressed to common carriers engaged in interstate transportation by railroad to any extent whatever, its prohibitions and penalties are not limited to interstate

commerce, but apply to intrastate railroads and to employees engaged in local business.

The prohibitions of the act are found in Section 2. This provides that it shall be "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employee subject to this act to be or remain on duty" for a longer period than that prescribed. The carriers and employees subject to the act are defined in Section 1 as follows: . . . [For text see I. C. Act, p. 210.]

No difficulty arises in the construction of this language. The first sentence states the application to carriers and employees who are "engaged in the transportation of passengers or property by railroad" in the District of Columbia or the territories, or in interstate or foreign commerce. The definition in the second sentence, of what the terms "railroad" and "employees" shall include, qualify these words as previously used, but do not remove the limitation as to the nature of the transportation in which the employees must be engaged in order to come within the provisions of the statute. If the definition in the last part of the sentence, of the words used in the first part, be read in connection with the latter, the meaning of the whole becomes obvious. The section, in effect, thus provides :

This act shall apply to any common carrier or carriers, their officers, agents, and employees (meaning by "employees" persons actually engaged in or connected with the movement of any train), engaged in the transportation of passengers or property by railroad (meaning by "railroad" to include all bridges and ferries used or operated in connection with any railroad) in the District of Columbia or any territory . . . or from one state . . . to any other state, etc.

In short, the employees to which the act refers, embracing the persons described in the last sentence of the section, are those engaged in the transportation of passengers or property by railroad in the district, territorial, interstate, or foreign commerce defined; and the railroad, including bridges and ferries, is the railroad by means of which the defined commerce is conducted.

The statute, therefore, in its scope, is materially different from the act of June 11, 1906, chapter 3073, 34 Stat. at L. 232, which was before this court in the *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*), 207 U.S. 463. There, while the carriers described were those engaged in the commerce subject to the regulating power of Congress, it appeared that if a carrier was so engaged, the act governed its relation to every employee, although the employment of the latter

might have nothing whatever to do with interstate commerce. In the present statute, the limiting words govern the employees as well as the carriers.

But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employees in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employees who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.

This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce, and of those who are employed in transporting them. *Johnson v. Southern P. Co.*, 196 U.S. 1; *Adair v. United States*, 208 U.S. pp. 177, 178; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U.S. 281; *Chicago, B. & Q. R. Co. v. United States*, 220 U.S. 559. The fundamental question here is whether a restriction upon the hours of labor of employees who are connected with the movement of trains in interstate transportation is comprehended within this sphere of authorized legislation. This question admits of but one answer. The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the Constitution. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U.S. 549.

If, then, it be assumed, as it must be, that, in the furtherance of its purpose, Congress can limit the hours of labor of employees engaged in

interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers, or by the commanding of duties relating to interstate and intrastate operations.

Second. It is also urged that the statute is void for uncertainty. This objection is based on the wording of the first proviso in Section 2 of the act, which is as follows: . . . [For text see I. C. Act, p. 211.]

It is said that the words, "except in case of emergency," make the application of the act so uncertain as to destroy its validity. But this argument in substance denies to the legislature the power to use a generic description, and, if pressed to its logical conclusion, would practically nullify the legislative authority by making it essential that legislation should define, without the use of generic terms, all the specific instances to be brought within it. In a legal sense there is no uncertainty. Congress, by an appropriate description of an exceptional class, has established a standard with respect to which cases that arise must be adjudged.

Nor does the contention gather strength from the broad scope of the proviso in Section 3, for if the latter, in limiting the effect of the entire act, could be said to include everything that may be embraced within the term "emergency," as used in Section 2, this would be merely a duplication which would not invalidate the act.

Third. Finding that the objections to the validity of the statute are not well taken, we are brought to the question whether the Interstate Commerce Commission has authority to require the reports called for by its order. . . . [The court here refers to Section 4 of the Hours of Service Act (I. C. Act, p. 212) and Section 20 (2) of the Interstate Commerce Act (I. C. Act, pp. 63-64).]

To enable the Commission properly to perform its duty to enforce the law, it is necessary that it should have full information as to the hours of service exacted of the employees who are subject to the provisions of the statute, and the requirements to which we have referred are appropriate for that purpose, and are comprehended within the power of the Commission.

Fourth. There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments of the Constitution of the United States. . . . [The argument on this point is omitted.]

The decree of the circuit court is affirmed.

QUESTIONS

1. Compare the definition of "employees" here given with that contained in Section 1(5) of the Railway Labor Act. Which is narrower, and why should there be any difference?

2. Assume the existence of a state law, passed in 1905, forbidding railways operating within the state to employ train dispatchers for more than eight hours in any twenty-four-hour period. Would an interstate railway requiring certain dispatchers whose work affected interstate trains to work nine hours a day be liable to prosecution under the act of 1906? Would it be liable to prosecution in 1909?

3. In Question 2 would the carrier be liable under the state act if it were passed in July, 1907, to take effect at once?

4. A railway uses an employee on interstate trains for fourteen consecutive hours and on strictly intrastate work for the three hours following. Has it violated the act?

5. B worked as a fireman on an interstate train for sixteen hours, and then, while the locomotive was tied up and sidetracked, remained on it as engine watchman for the next eight hours. Has the act been violated?

6. Does the word "permit" in Section 2 imply intent, knowledge, or consent on the part of the carrier or its agents? Suppose the delay is due to a violation of instructions by the employee?

7. Give examples of "emergencies" that would justify employment beyond the hours fixed by the act.

8. Illustrate delays resulting from causes that "could not have been foreseen."

3. REGULATION OF THE CARRIAGE OF DANGEROUS ARTICLES

[The pertinent statutory provisions are found in the Transportation of Explosives Act (I. C. Act, pp. 214-216). These provisions, with the exception of Section 236 and the last paragraph of Section 232, appeared in substantially their present form in an act approved May 30, 1908. Section 236 was added in 1909, and the last paragraph of Section 232 in 1921.]

QUESTIONS

1. A railroad has tracks running through the main streets of a city. The city council passes an ordinance prohibiting the carriage of any explosive except railroad signal devices by the carrier over such tracks. Will such an ordinance be upheld by the courts?

608 GOVERNMENT AND RAILROAD TRANSPORTATION

2. Have the states any power to make regulations concerning the carriage of explosives, within their borders?

3. On what grounds could Federal regulation of such transportation be justified?

4. REPORTING OF ACCIDENTS

[The pertinent statutory provisions are found in an act approved May 6, 1910 (I. C. Act, pp. 206-208). This act amended an earlier one passed in 1901, which contained similar provisions for reports, although it lacked the present Sections 3 and 4.]

QUESTIONS

1. How do the provisions of this act affect the safety of employees? of passengers?

2. Would you class as a regulation of commerce a statute which requires only the making of a report?

3. An accident occurs on the New York Central Railroad. A train running from New York City to Albany is derailed. The Interstate Commerce Commission appoints an investigator to make a report on the accident. The railroad company alleges that the Commission's representative has no power. Decide.

O. FEDERAL LEGISLATION RELATING TO RAILWAY LABOR DISPUTES

1. THE ACT OF 1888

[Only a brief synopsis of the earlier legislation is given, since it had a comparatively limited use.]

*The Act of 1888*¹

... The act of 1888 provided two methods of dealing with disputes between interstate carriers and their employees: voluntary arbitration and investigation. There was nothing smacking of compulsion in connection with the arbitration. If one party to a controversy proposed in writing that it should be submitted to arbitration, and the other accepted, the statute prescribed how the board of arbitration

¹ A. R. Ellingwood, "The Railway Labor Act of 1926." *Journal of Political Economy*, Vol. XXXVI, pp. 53-54. Reprinted by permission of The University of Chicago Press.

should come into existence, and gave it some official standing by granting it certain quasi-judicial powers, defining its duties, providing for the payment of the expenses of the arbitration out of the United States Treasury, and requiring that the decision should be made public. Except that one member of the board was appointed by each party to the dispute, and that, presumably, the agreement to arbitrate would usually contain mutual promises to abide by the decision, there is not much to distinguish this first process from the investigation conducted by a special commission consisting of the commissioner of labor and two temporary commissioners appointed by the president. The commission was given essentially the same procedural powers as a board of arbitration, was required to hear interested persons, advise them what ought to be done to adjust the dispute, and make a report to the president and Congress, covering the causes and conditions of the controversy and the best means for settling it. Its proceedings were to be conducted publicly. Such an investigation might be "tendered" on the president's initiative, or on the application of either party, or the executive of the state in which the controversy arose.

No arbitration under this act ever took place, but the investigatory machinery was used at the time of the Pullman strike of 1894. However, the hearings in that case were not held till the strike had come to an end, so that the report of the commission contributed nothing to the settlement of that particular dispute.

2. THE ERDMAN ACT

*The Erdman Act*¹

The Erdman Act of 1898, like its predecessor, set out two ways of dealing with labor controversies on interstate railways: mediation and conciliation, and voluntary arbitration. Upon the application of either party to a dispute, the chairman of the Interstate Commerce Commission and the United States Commissioner of Labor were required to "use their best efforts, by mediation and conciliation, to amicably settle the same." Only if those efforts were unsuccessful were they to try to bring about an arbitration under the act. The statute required an arbitration agreement made in writing, which should include certain stipulations relating to the arbitration and the effect of the arbitral award. An award was filed in a Federal circuit

¹ Ibid. pp. 54-55.

court and judgment was entered upon it, unless either party within ten days filed a bill of exceptions "for matter of law apparent upon the record." In the latter case an appeal could be taken to the circuit court of appeals. When judgment was entered, the award could be enforced by equity proceedings "so far as the powers of a court of equity permit," provided that no person could be compelled to perform against his will a contract of personal service. The act required that the *status quo* should be maintained while arbitration was taking place, making it unlawful for employers parties thereto to discharge employees (except for inefficiency, violation of law, or neglect of duty), or for employees to call, unite in, aid or abet strikes. The compensation and expenses of the arbitration were to be paid by the Federal government. Sections of the act dealing with railways in the hands of Federal receivers and with labor unions need not be considered in this place.

Practically no use was made of the Erdman Act till December, 1906, but during the following six years and a half, sixty-one cases were dealt with under its provisions. Twenty-six of these were settled by mediation, ten by mediation and arbitration, and six by arbitration alone. No arbitral award made under the Erdman Act was repudiated by the disputants involved. In one case there was an appeal to the courts, but the year's delay that this entailed discouraged the practice.

Various defects became apparent from the experience under the Erdman Act, and the threat of a strike by the conductors and trainmen on the Eastern railways furnished the immediate occasion for amending that statute in several respects, and brought about the passage of the Newlands Act of 1913. . . .

3. THE NEWLANDS ACT

[A]

*The Newlands Act*¹

SECTION 1. [Describes the carriers to whom the act shall apply, and defines "employees," for purposes of the act, as "persons actually engaged in any capacity in train operation or train service of any description." The section is identical with Section 1 of the Erdman Act.]

SECTION 2. That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between an employer

¹ Act of July 15, 1913, 38 Stat. L. 103.

or employers and employees subject to this act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this act and invoke its services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this act.

In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seem desirable, proffer its services to the respective parties to the controversy.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable.

[The first paragraph of this section is not materially different from Section 2 of the Erdman Act, except for the substitution of the Board for the Chairman of the Interstate Commerce Commission and the Commissioner of Labor, but paragraphs 2 and 3 are new.]

SECTION 3. That whenever a controversy shall arise between an employer or employers and employees subject to this act, which cannot be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the

event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

In the event that the employees engaged in any given controversy are not members of a labor organization, such employees may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employees as provided above in this section.

[The Erdman Act had provided only for an arbitral board of three.]

SECTION 4. That the agreement to arbitrate

First. Shall be in writing;

Second. Shall stipulate that the arbitration is had under the provisions of this act;

Third. Shall state whether the board of arbitration is to consist of three or six members;

Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees;

Fifth. Shall state specifically the questions to be submitted to the said board for decision;

Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings;

Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That this period shall be thirty days unless a different period be agreed to;

Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

Tenth. Shall provide that the respective parties to the award will each faithfully execute the same ;

Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record ;

Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a subcommittee of such board for a ruling, which ruling shall have the same force and effect as the original award ; and if any member of the original board is unable or unwilling to serve, another arbitrator shall be named in the same manner as such original member was named.

[According to the Erdman Act the arbitral board was bound in every case to begin its hearings in ten days, and to file its award within thirty days, from the date of the appointment of the third arbitrator, and the award was to continue in force for one year. Paragraph 12 is altogether new.]

SECTION 5. That for the purposes of this act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpoenas, require the attendance and testimony of witnesses and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court ; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the Act to Regulate Commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto.

[This is identical with Section 5 of the Erdman Act.]

SECTION 6. [Provides for filing every agreement of arbitration with the Board of Mediation and Conciliation, makes it the duty of the

board to notify the arbitrators already selected and the duty of the latter to notify the board of the arbitrator or arbitrators chosen by them or of their failure to make a selection, and requires the board to reconvene an arbitral board upon the joint request of the parties. This enlarges considerably upon the similar duties of notification imposed upon the chairman of the Interstate Commerce Commission by Section 6 of the Erdman Act.]

SECTION 7. [Gives details as to the place of meeting and procedure of a board of arbitration. The original award is to be filed with the clerk of the Federal district court, and certified copies are to go to the parties and to the Board of Mediation and Conciliation. There is no similar section in the Erdman Act.]

SECTION 8. That the award, being filed in the clerk's office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Nothing in this act contained shall be construed to require an employee to render personal service without his consent, and no injunction

or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service.

[This is substantially the same as Section 4 of the Erdman Act, except for the last paragraph, which is taken from Section 3 of the earlier statute.]

SECTION 9. [Gives employees on railroads in the hands of receivers appointed by a Federal court a right to be heard in such court on questions affecting the terms and conditions of their employment, and forbids receivers to reduce wages except by authority of the court and after twenty days' notice of the hearing. Practically the same as Section 9 of the Erdman Act.]

SECTION 10. [Deals with the compensation of boards of arbitration and the expenses of the Board of Mediation and Conciliation.]

SECTION 11. [Provides for the appointment of the three members of the Board of Mediation and Conciliation, and of an assistant commissioner, by the president and Senate, and fixes terms of office, salaries, duties, and the like; also repeals the Erdman Act.]

[B]

*Experience under the Newlands Act*¹

During the period from July 15, 1913, to June 30, 1919, the services of the board were:

	NUMBER OF CASES	INVOLVING	
		Railroads	Employees
Requested by			
Railroads in	29	392	477,667
Employees in	74	85	23,211
Jointly in	27	50	21,401
The public in	2	2	135
And tendered to			
Railroads and employees jointly, in the absence of any request, in	16	57	98,396
	148	586	620,810

¹ Report of the Commissioner of Mediation and Conciliation on the Operations of the United States Board of Mediation and Conciliation (1913-1919), pp. 24-25.

616 GOVERNMENT AND RAILROAD TRANSPORTATION

Disposition was made of these 148 cases as follows :

Settled by	
Mediation alone	70
Mediation and arbitration	21
The parties before mediation began	11
The parties after mediation began	8
	110
Congressional action (Adamson Law)	<u>1</u>
	111
Mediation suspended or discontinued	3
No action taken by board, because existing controversy does not come within provisions of Newlands Law	11
Controversy abandoned by employees	2
Agreement on some points reached in mediation, and mediation discontinued before final settlement because of roads being taken under Federal control	2
Removed from jurisdiction of board before mediation began, because of roads being taken under Federal control	14
Services of board declined by	
Railroads	2
Employees	<u>1</u>
	3
Cases pending	35
Total number of cases	<u>2</u>
	148

4. THE RAILROAD LABOR BOARD

[A]

*The Statutory Provisions*¹

SECTION 300. [Defines "carrier," "adjustment board," "labor board," "commerce," and "subordinate official."]

SECTION 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which, under the provisions of this title, is authorized to hear and decide such dispute.

¹ Transportation Act of 1920, Sections 300-316.

SECTION 302. Railroad boards of labor adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate official of carriers, or organization or group of organizations thereof.

SECTION 303. Each such adjustment board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the adjustment board's own motion, or (4) upon the request of the Labor Board whenever such board is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence, decide any dispute involving only grievances, rules, or working conditions, not decided as provided in Section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of Section 302, represented upon any such adjustment board.

SECTION 304. There is hereby established a board to be known as the "Railroad Labor Board" and to be composed of nine members, as follows:

(1) Three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the commission shall by regulation prescribe;

(2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the commission shall by regulation prescribe; and

(3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

Any vacancy of the Labor Board shall be filled in the same manner as the original appointment.

SECTION 305. [Authorizes the president to make appointments directly in case nominations under the preceding section are not made within a prescribed time.]

618 GOVERNMENT AND RAILROAD TRANSPORTATION

SECTION 306. [Deals with eligibility, term, salary, and removal of members of the board.]

SECTION 307. (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any adjustment board certifies to the Labor Board that in its opinion the adjustment board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any adjustment board has so failed or is not using due diligence in its consideration thereof. In case the appropriate adjustment board is not organized under the provisions of Section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in Section 301 and which such adjustment board would be required to receive for hearing and decision under the provisions of Section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301. The Labor Board may upon its own motion within ten days after the decision, in accordance with the provisions of Section 301, of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so sus-

pended and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

(c) A decision by the Labor Board under the provisions of paragraphs (a) or (b) of this section shall require the concurrence therein of at least five of the nine members of the Labor Board: *Provided*, That in case of any decision under paragraph (b), at least one of the representatives of the public shall concur in such decision. All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each adjustment board, and the commission, and shall be given further publicity in such manner as the Labor Board may determine.

(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an adjustment board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working conditions the board shall, so far as applicable, take into consideration among other relevant circumstances

- (1) The scales of wages paid for similar kinds of work in other industries;
- (2) The relation between wages and the cost of living;
- (3) The hazards of the employment;
- (4) The training and skill required;
- (5) The degree of responsibility;
- (6) The character and regularity of the employment; and
- (7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.

SECTION 308. [Deals with questions of procedure and publications and authorizes informatory investigations.]

SECTION 309. [Gives parties the right to a hearing.]

SECTION 310. [Gives the board and its members the right to subpoena witnesses and papers etc., administer oaths, and examine witnesses, with power to invoke the assistance of a Federal court to make a subpoena effective; also gives immunity from prosecution on account of any transaction etc. to which the testimony relates.]

SECTION 311. [Gives to members of the board the right of access to relevant records, correspondence, etc.]

SECTION 312. [A transitory provision.]

620 GOVERNMENT AND RAILROAD TRANSPORTATION

SECTION 313. [Gives the board power to investigate alleged violations of its decisions.]

SECTION 314. [Deals with employees and equipment of the board.]

SECTION 315. [An appropriation.]

SECTION 316. [Excludes the board created by the Newlands Act from disputes received by the Labor Board or an adjustment board.]

[B]

*Experience under the Railroad Labor Board*¹

From the date of its establishment to December 31, 1925, 13,941 disputes had been referred to the board. Of this number, 6006 were of a local nature, affecting individual roads and their employees in one or more classes of service or possibly two or three railroads at one point; and 7935 were of a general nature, affecting large groups of railroads and their employees in any or all classes of service, such as general requests for wage increases or wage decreases or general revision of rules governing working conditions. The board during this period disposed of 13,447 of these submissions, 5549 of which were of local nature and 7898 of general nature. Of the total number of disputes, 912 did not reach the status of regularly docketed cases.

5. THE RAILWAY LABOR ACT

[A]

[The pertinent statutory provisions are found in the Railway Labor Act of May 20, 1926 (I. C. Act, pp. 180-197).]

QUESTIONS

1. What are the different possible methods for settling disputes under the act? Can you find the forerunner of each of them in the earlier legislation?
2. In what respects did the Railway Labor Act improve upon the Newlands Act? upon the Transportation Act of 1920?
3. Why should there be different methods for settling the two different kinds of disputes dealt with in the act?

¹ Report of the United States Railroad Labor Board, April 15, 1920-December 31, 1925, p. 9.

4. Compare the process of arbitration under the act with that provided in the Newlands Act.

5. What was the purpose of the proviso relating to the Interstate Commerce Commission in Section 7 (f)?

6. Compare the protection given the public against rate increases resulting from wage increases by the Transportation Act of 1920, and that given by the Railway Labor Act.

7. Is a settlement that is reached through arbitration likely to be more permanent than one resulting from mediation and conciliation, or vice versa?

8. The Brotherhood of Railway Clerks, with which the T railway has dealt in matters relating to its clerks, demands a 20 per cent increase in the pay of clerks. The request is denied, and the Brotherhood files the case with the Board of Mediation. The railway fosters a company union of clerks and declines to deal further with the Brotherhood. The latter asks a Federal district court for an injunction restraining the railway from interfering with their employees in the designation of their representatives contrary to Section 2, paragraph 3, of the Railway Labor Act. The railway replies that (1) this paragraph 3 was not intended to, and does not, confer any rights enforceable by injunction, (2) if construed so as to confer such rights it is unconstitutional as an unreasonable interference with the right of an employer to deal directly with his employees, (3) such an injunction is forbidden by Section 20 of the Clayton Act, since the alleged right of the employees is not a property right. Discuss the validity of these contentions.

9. An arbitration agreement made under the act provides for the appointment of six arbitrators, and requires that they shall begin their hearings within fifteen days from the date of appointment of the sixth arbitrator and shall file their award within sixty days from the beginning of the hearings. The board is completed on June 1 and begins hearings on June 10. On July 20 it files a document with the clerk of the United States district court stating that it is unable to agree. On August 1 the chairman of the board, at the request of representatives of the employees, of three of the arbitrators, and of the chairman of the Board of Mediation, notifies all arbitrators that the board will reconvene on August 3. The arbitrators representing the railways decline to come; the other four meet, and on August 5 file a unanimous award. Is the award valid?

[B¹]

The Work of the Board

During the fiscal year ended June 30, 1928, the Board of Mediation received 98 separate applications for its services in the adjustment of differences concerning rates of pay, rules, or working conditions

¹ Annual Report of the United States Board of Mediation, 1928, pp. 11, 58-60.

between carriers and employee organizations, making a total of 363 such applications received since its creation. The 98 cases received involved 21 railroad labor organizations and 176 carriers. The individual cases presented varied widely in the number of carriers and employees involved and in the character of questions at issue. One case affecting a regional area involved 90 carriers and 25,000 employees; another case involved 89 carriers and 55,000 employees; in other cases only a single carrier and groups as small as 18 employees participated. Approximately 1600 carriers, subject to the Interstate Commerce Act and under the direction of 791 operating organizations, and about 2,000,000 employees are eligible for the services of our board under the act.

Of the 363 cases submitted to our board 256 had been disposed of by June 30, 1928, and 145 of these were settled during the fiscal year covered by this report. Of these 145 cases, 84 were settled through mediation, 14 cases were submitted to arbitration, 37 cases were withdrawn through mediation, 8 cases were withdrawn without mediation consideration, and 2 cases were closed by board action. In five of the cases reported as having been disposed of during the previous year through submission to boards of arbitration, the agreements to arbitrate were subsequently canceled. Two of these cases were later settled by mediation and three by withdrawal. By the end of the year 9 out of the 14 cases submitted to arbitration had been concluded by awards under the act. . . . At the end of the year, 107 of the total of 363 cases received still remained unsettled. Of this number 58 had been assigned for mediation and were being held in abeyance awaiting the arrangement of mediation conferences. The remaining 49 cases had not been accepted for mediation.

In addition to the foregoing rates of pay, rules or working-condition cases, the board received during the year applications for its services in the adjustment of 58 other cases, for the most part grievance matters involving the interest of employees as affected by the application of rules or of discipline. During the preceding year 62 cases of similar character were received. Of this total of 120 grievance cases 3 have been disposed of, 2 by voluntary withdrawal and 1 through mediation.

The consideration of grievance matters by the Board of Mediation, as provided in the Railway Labor Act, contemplates the creation of appropriate adjustment boards. Such adjustment boards have not been generally created. Consequently, the Board of Mediation has

been hampered in its efforts to render services in such cases. In several instances, however, during the mediation of wage and rules differences, contingent or related grievance matters have been adjusted. . . .

General

. . . The Railway Labor Act imposes alike upon all carriers and employee groups the duty to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle between themselves and with all expedition differences arising therefrom. It is apparent that both carriers and organizations representing employees are endeavoring more and more to dispose of differences through direct negotiation and without resort to governmental assistance. Exclusive of grievance adjustments, regarding which no data are available, incomplete reports indicate that since the enactment of the Railway Labor Act more than 600 direct and voluntary settlements have been made by the parties involving the adjustment of wages and rules governing working conditions. Many of these settlements doubtless have been materially assisted through the influence of conclusions previously reached in respect of other proceedings under the provisions of the Railway Labor Act.

In a field of industry wherein technical and practical features are so numerous it is but natural that it should be difficult and in some instances impossible to arrive at conclusions involving the expenditure of large amounts of money to the entire satisfaction of all parties involved. There has been during the year some, but decreasing, resistance to the submission of disputes to mediation. There has, however, been definite and discouraging objection to entering into agreements to arbitrate as clearly contemplated in the law, the passage of which was advocated and subscribed to before Congress by representatives of employee and carrier organizations — proponents of the Railway Labor Act. In the opinion of our board this is due in a measure to different conceptions as to the intent of certain provisions of the law, and also to varying established policies or to a changed attitude on the part of either or both parties in dealing with their industrial problems.

The creation of adjustment boards to dispose of grievance matters as contemplated in the law has been retarded by reason of the complexity of the problem and the absence of any coherent plan generally acceptable to all those immediately concerned. The carriers, employee

organizations, and the Board of Mediation are giving earnest consideration to this question. . . .

The Railway Labor Act on the 30th of June, 1928, had been actively administered in the field for twenty-three months, during which time cases and experiences had been sufficiently numerous and comprehensive to warrant an opinion as to the results, pro and con, to the railroads and the employees and particularly to the public. The Board of Mediation believes that the credit side of the account is far greater than the debit, if, indeed, any important debit items can be found when considering the workings of the law broadly viewed. . . .

P. REGULATION OF COMMON CARRIERS BY WATER IN FOREIGN COMMERCE

[A]

[The pertinent statutory provisions are found in Section 25 of the Interstate Commerce Act (I. C. Act, pp. 77-79).]

[B]

Export Bill of Lading

Interstate Commerce Commission (1921), 64 I. C. C. 347

HALL, *Commissioner* :

This is an investigation instituted on our own motion into the practices of carriers with respect to the form and substance of bills of lading, and the issuance, transfer, and surrender thereof. . . .

On June 15, 1920, the following notice was sent to respondent carriers by railroad and by water :

On April 5, 1920, the Commission issued a circular letter in transmitting Foreign Commerce Order No. 1, in which the following notice was given :

Railway carriers and such water carriers (carriers by water in foreign commerce, whose vessels are registered under the laws of the United States) should arrange for conferences at the earliest practicable date with a view to immediately complying with the provisions of paragraph (4) of Section 25, which imposes upon the railway carrier the duty of issuing a through bill of lading to the foreign point of destination and after an agreement as to this uniform bill of lading has been reached by such carriers, it should be presented to the Commission for its approval. Representatives of shippers should be freely consulted and the Commission should be advised from time to time as to the progress which is being made.

It is now requested that the carriers by railroad submit on or before August 1, 1920, tentative forms of through export bills of lading which they may desire to issue in connection with carriers by water whose vessels are registered under the laws of the United States, and in connection with carriers by water whose vessels are of foreign registry.

It is further requested that 500 copies of these forms of through export bills of lading be furnished the Commission for distribution to export shippers, and other parties interested, in order that they may have the opportunity to file any objections or suggestions they may desire to make with respect to the form and substance thereof, it being the intent and purpose of the Commission thereafter to hold hearings and conferences with a view to reconciling as far as possible such differences as may be developed, and to define the issues with respect to such differences as cannot be reconciled.

On August 7, 1920, we entered an order reopening the proceeding for further hearings with respect to the form and substance of through export bills of lading and issued a notice stating that separate forms of through export bills of lading had been submitted by the Southern, Eastern, and Western carriers, respectively. Those of the Eastern and Southern carriers differ from each other only in minor details. That of the Western carriers is a modification of the export bill prescribed by us in our former report, and differs considerably from those of the other carriers. Only the Eastern carriers file with us, as part of their tariff publications, a form of through export bill of lading.

Pursuant to the order and notice we have held further hearings, received briefs, and heard oral argument. In this report we deal only with the through export bill of lading for shipments to nonadjacent foreign countries to be issued by carriers subject to the Interstate Commerce Act in connection with ocean carriers whose vessels are registered under the laws of the United States.

There is conflict of view among the parties as to our jurisdiction. The question is one of law, but pending judicial interpretation of the pertinent provisions of the act we must construe them in endeavoring to perform the administrative duties which they impose upon us.

The inland carriers, and more particularly the Eastern carriers, challenge our power to do more than prescribe the "form" as distinguished from the substance of the bill of lading. The Eastern carriers say :

Illustrations of form would be a rule requiring different colored paper to distinguish order from straight bills; requiring the paper to be of a prescribed size; instructions as to size of type; printing conditions on face; that the inland conditions and the ocean conditions shall be printed separately, etc.

Counsel for American ocean carriers operating in foreign commerce on the Atlantic Ocean make clear their belief that we have no power to prescribe any condition applicable to them without their consent.

Upon our invitation a representative of the United States Shipping Board was present at the hearings. He does not think "that the Interstate Commerce Commission has jurisdiction over water carriers," and on behalf of the Shipping Board desired "to save any proper objections and exceptions to the jurisdiction of the Commission, and exceptions to the evidence"; adding: "I do this in order to preserve our rights in case it should become valuable hereafter." . . .

We think that the argument of the Eastern carriers emphasizes the word "form" in the expression "make such rules and regulations not inconsistent herewith as will prescribe the form of such through bill of lading" at the expense of the other words, such as, for example, "not inconsistent herewith," and to the entire exclusion of the various provisions in the act to which we have referred. These deal with substance, and inconsistency therewith could hardly arise in matters unsubstantial. Their interpretation would imply that each carrier could insert its own peculiar phraseology in its bill of lading, while the intention of Congress to have a uniform bill of lading, prescribed by us under the circumstances there described, is clearly indicated in Section 25. It would be difficult, if not impossible, to prevent the unjust discrimination and undue prejudice forbidden by the Interstate Commerce Act if the carriers subject to that act could vary the terms of the contract of transportation at will in dealing with different shippers of the same commodity. That the Eastern carriers themselves, in a similar connection, attach a much broader significance to the word "form" than they here admit is shown in Section 18, Part II, of their proposed export bill of lading, reading, "The property covered by this bill of lading is subject to all conditions expressed in the regular form of bill of lading in use by the Steamship Company. . . ." We are required by Section 25 of the act to "preserve for the carrier by water the protection of limited liability provided by law," and this cannot be done by specifying color of paper or size of type.

We are of opinion that our power to prescribe rules and regulations, not inconsistent with the act, which shall constitute and determine the form of the bill of lading, covers the terms or tenor of that instrument and is, as to the transportation until delivery to the ocean carrier, adequate and complete. And the intent of the Congress to require a

uniform through export bill of lading and to have the terms thereof prescribed by us seems clear. . . .

Upon the record we are of opinion and find that the general provisions, and the rules and regulations relating to the service until delivery at the port of export, contained in the through export bills of lading used by the carriers respondent, in connection with ocean carriers whose vessels are registered under the laws of the United States, for the transportation of property from points within the United States, designated by us under the provisions of Section 25 of the Interstate Commerce Act, to points in nonadjacent foreign countries, will be unreasonable for the future in so far as they differ from the rules and regulations hereby made by us prescribing the form of uniform through export bill of lading set forth in Appendix D, which we find will be reasonable for the future. . . .

We are further of opinion and find that the carriers respondent herein should publish and file, in the manner prescribed in Section 6 of the Interstate Commerce Act, and thereafter observe and apply to the transportation of property by them, in connection with ocean carriers whose vessels are registered under the laws of the United States, from points within the United States designated by us under the provisions of Section 25 of the Interstate Commerce Act to points in nonadjacent foreign countries, the rules and regulations made by us prescribing the form of uniform through export bill of lading set forth in Appendix D. . . .

An appropriate order will be entered.

QUESTIONS

1. What duties does this section of the act place on the railroads?
2. To what extent are steamship companies affected by the section?
3. Is the Interstate Commerce Commission given jurisdiction over ocean carriers? How far does the Commission's power extend?
4. What is the specific purpose of this section of the act?
5. Are the regulations designed to aid more particularly a company shipping a large volume of goods in foreign commerce or a company doing a relatively small amount of such business?
6. Is the issue of a through bill of lading for export shipments important? Why?
7. Does such regulation constitute an unfair discrimination against American vessels?
8. How do the requirements of Section 25 affect import shipments?

Q. INLAND WATERWAYS TRANSPORTATION

[A]

[In the period of Federal control during the latter part of the World War and afterwards, the Federal government acquired various boats, barges, tugs, and other transportation facilities and established certain lines of inland water transportation. In Sections 201 and 500 of the Transportation Act of 1920, Congress provided for the continued operation of these lines by the Secretary of War (see I. C. Act, pp. 116-118, 138-139). Later legislation relating to the same subject is printed below.]

[B]

*The Inland Waterways Corporation*¹

... That for the purpose of carrying on the operations of the government-owned inland, canal, and coastwise waterways system to the point where the system can be transferred to private operation to the best advantage of the government, of carrying out the mandates of Congress prescribed in Section 201 of the Transportation Act, 1920, as amended, and of carrying out the policy enunciated by Congress in the first paragraph of Section 500 of such act, there is hereby created a corporation, in the District of Columbia, to be known as the Inland Waterways Corporation (hereinafter referred to as the "corporation"). The Secretary of War shall be deemed to be the incorporator, and the incorporation shall be held effected upon the enactment of this act. The Secretary of War shall govern and direct the corporation in the exercise of the functions vested in it by this act.

SECTION 2. The capital stock of the corporation shall be \$5,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of \$5,000,000 for the purpose of paying such subscription.

SECTION 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal

¹ 43 Stat. at L. 360-363.

facilities now being operated by or under the direction of the Secretary of War, under Section 201 of the Transportation Act, 1920, as amended, and shall, as soon as there is an improved channel sufficient to permit the same, initiate the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) If the Secretary of War deems it advisable to discontinue the operation of any part of the transportation or terminal facilities, or to develop and operate new lines, in order to give the public the proper service, he shall report thereon to Congress. The operation of any of such facilities shall not be discontinued and new lines shall not be developed or operated until authorized by Congress.

(c) The operation of the transportation and terminal facilities under this act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

SECTION 4. (a) The Secretary of War shall appoint an Advisory Board of six members (hereinafter referred to as the "board") from individuals prominently identified with commercial or business interests in territory adjacent to the operations of the corporation. No member of the board shall be an officer, director, or employee of, or substantially interested in, any railroad corporation. Two of such members shall continue in office for terms of one year, and the remaining four for terms of two, three, four, and five years, respectively, from the date of appointment, the term of each to be designated by the Secretary of War. Each successor shall be appointed by the Secretary of War for a term of five years from the date of the expiration of the term of the member whom he succeeds, except that any successor appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired term of the member whom he succeeds. A vacancy in the board shall not impair the powers of the remaining members to execute the functions of the board.

(b) The members shall receive no salary for their services on the board but, under regulations and in amounts prescribed by the Secretary of War, may be paid by the corporation a reasonable per-diem compensation for attending meetings of the board and for time spent

on special service of the corporation, and their traveling expenses to and from such meetings, or when assigned to such special service.

(c) In addition to the six members, the Secretary of War shall appoint an individual from civil life, or (notwithstanding Section 1222 of the Revised Statutes or any other provision of law, or any rules or regulations issued thereunder) detail an officer from the Military Establishment of the United States, as chairman of the board. Any officer so detailed shall, during his term of office as chairman, have the rank, pay, and allowances of a brigadier general, United States Army, and shall be exempt from the operation of any provision of law, or any rules or regulations issued thereunder, which limits the length of such detail or compels him to perform duty with troops. Any individual appointed from civil life shall, during his term of office as chairman, receive a salary not to exceed \$10,000 a year to be fixed by the Secretary of War. The Secretary of War may delegate to the chairman any of the functions vested in the Secretary by this act.

(d) The board shall meet for organization purposes when and where called by the Secretary of War, and thereafter at such times and places as the Secretary deems necessary. The board shall consider matters submitted to it by the Secretary of War, and make recommendations thereon, and from time to time advise him and make recommendations, in respect of the management and operation of existing facilities, or the development and operation of new lines.

SECTION 5. The corporation

(a) Shall have succession in its corporate name during its existence;
 (b) May sue and be sued in its corporate name;
 (c) May adopt a corporate seal, which shall be judicially noticed, and may alter it at pleasure;

(d) May make contracts;

(e) May acquire, hold, and dispose of property;

(f) May appoint, fix the compensation of, and remove such officers, employees, attorneys, and agents as are necessary for the transaction of the business of the corporation; define their duties, and require bonds of them, and fix the penalties thereof;

(g) May incur obligations, borrow money for temporary purposes, and issue notes or other evidences of indebtedness therefor, but the aggregate amount of the indebtedness at any time shall not exceed 25 per centum of the value of the assets at such time;

(h) May exercise any of the functions vested in the Secretary of War by Sections 201 and 500 of the Transportation Act, 1920, as amended;

(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation.

SECTION 6. (a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under Section 201 of the Transportation Act, 1920, as amended, or under the joint resolution entitled "Joint resolution to exempt the New York State Barge Canal from the provisions of Section 201 of the Transportation Act, 1920, and for other purposes," approved February 27, 1921.

(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under Section 201 of such act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation.

(c) All money available for expenditure or the making of loans under such joint resolution or Section 201 of such act, and all money repaid in pursuance of loans made under subdivision (c) of Section 201 of such act, shall be available for expenditure or the making of loans by the corporation under this act.

(d) The enforceable claims of or against the Secretary of War, or the inland and coastwise waterways service, in respect of the operation, construction, or acquisition of any such transportation facilities, shall become the claims of or against, and may be enforced by or against, the corporation.

(e) The Secretary of War shall adjust and appraise the value, at the time of transfer, of all assets transferred to the corporation under this act, and such value shall be entered upon the books of the corporation.

(f) In the determination of the running of the statute of limitations or of any prescriptive right, the period of time shall be computed in the same manner as though this act had not been passed.

Approved, June 3, 1924.

QUESTIONS

1. What are the economic reasons for and against the government's carrying on the business intrusted to the corporation?
2. In particular, what justification is there for the government's entering into competition with other inland water carriers and with railways?
3. Why should the operation of the facilities under the act be subjected to the provisions of the Interstate Commerce Act?

[C]

*The Amending Act of May 29, 1928*¹

... That Section 2 of the act entitled "An Act to create the Inland Waterways Corporation for the purpose of carrying out the mandate and purpose of Congress, as expressed in Sections 201 and 500 of the Transportation Act, and for other purposes," approved June 3, 1924, ... be, and the same is hereby, amended to read as follows:

SECTION 2. The capital stock of the corporation shall be \$15,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States, and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of \$10,000,000, in addition to the \$5,000,000 heretofore authorized, for the purpose of paying such subscription.

SECTION 2. That Section 3 of said act be, and the same is hereby, amended to read as follows:

SECTION 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War under Section 201 of the Transportation Act, 1920, as amended, and shall continue to operate the facilities now being operated or that may hereafter be operated by it under the provisions of this act; and shall, as soon as there is an improved channel sufficient to permit the same, initiate and continue the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) When the improvement of any tributary or connecting waterway of the Mississippi River, not including the Ohio River, shall have been completed or advanced to the point where within two years thereafter there will have been

¹ Statutes of the United States passed at the First Session of the Seventieth Congress, chap. 891, pp. 978-981.

substantially completed a sufficient and dependable channel for the safe operation of suitable barges and towboats thereon; and when the Chief of Engineers of the United States Army shall certify that fact to the Secretary of War, the Secretary of War shall thereupon cause a survey of such tributary or connecting waterway to be made for the purpose of ascertaining the amount of traffic, the terminal facilities, and the through routes and joint tariff arrangements with connecting carriers, that are or will, within such years, probably be available on such tributary or connecting waterway. As soon thereafter as such survey shall have been completed and a sufficient and dependable channel for the safe operation of suitable barges and towboats shall have been substantially completed, the Secretary of War may, if he finds from such survey that water transportation can, in the public interest, be successfully operated on such tributary or connecting waterway, extend the service of the Inland Waterways Corporation thereon as soon as the corporation shall have suitable facilities available therefor.

(c) It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until (1) there shall have been completed in the rivers where the corporation operates, navigable channels, as authorized by Congress, adequate for reasonably dependable and regular transportation service thereon; (2) terminal facilities shall have been provided on such rivers reasonably adequate for joint rail and water service; (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; and (4) private persons, companies, or corporations engage, or are ready and willing to engage, in common-carrier service on such rivers.

(d) When the Secretary of War shall find that navigable channels and adequate terminals are substantially available as provided in paragraph (c) of this section, and when the Interstate Commerce Commission shall report to the Secretary of War that joint tariffs with rail carriers have been published and filed as provided in said paragraph, the Secretary of War is hereby authorized to lease for operation under private management, or to sell to private persons, companies, or corporations, the transportation facilities, or any unit thereof, belonging to the corporation: *Provided*, That for the purpose of this paragraph the facilities of the corporation on the Mississippi River and its tributaries shall be considered one unit, and those on the Warrior River and its tributaries as one unit: *Provided further*, That the facilities of the corporation shall not be sold or leased (1) to any carrier by rail or to any person or company directly or indirectly connected with any carrier by rail; or (2) to any person, company, or corporation who shall not give satisfactory assurance and agree, as part of the consideration for such sale or lease, that the facilities so sold or leased will be continued in the common-carrier service in a manner substantially similar to the service rendered by the corporation, together with ample security by bond or otherwise to insure the faithful performance of such agreement; or (3) until the same has been appraised and

the fair value thereof ascertained and reported to the President by the Interstate Commerce Commission, and the sale or lease thereof has been approved by the President.

(e) Any person, firm, or corporation, including the Inland Waterways Corporation, engaged or about to engage in conducting a common-carrier service upon the Warrior River or the Mississippi River, or any tributaries thereof, may apply to the Interstate Commerce Commission and obtain a certificate of public convenience and necessity in accordance with the provisions of Section 1 of the Interstate Commerce Act, as amended, and the Interstate Commerce Commission shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates with reasonable rules, regulations, and practices, as provided in paragraph (3) of Section 15 of the Interstate Commerce Act, as amended, and the Commission shall, in such order, fix reasonable minimum differentials between all-rail rates and joint rates in connection with said water service to apply until changed by order of the Commission. Such joint routes, rates, rules, regulations, and practices may be changed by order of the Commission or by agreement of the water carriers and the other participating carriers. The Commission shall further require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of the aforesaid joint differential rates within thirty days after such joint rates are established, and if the carriers are unable to agree upon equitable divisions within one hundred and twenty days from date of publication the Commission shall, by order, determine and establish reasonable divisions to become effective coincident with the effective date of the joint rates. The Commission is hereby given authority upon complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning (1) the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the Commission, or (2) the reasonableness of any minimum differentials between all-rail rates and joint rates in connection with any water service; or (3) the reasonableness of any division of joint rates ordered by the Commission under the provisions of this act; and after full hearings the Commission may make such order with reference to any such matters as it may find to be proper and in the public interest. At any such hearing the burden of proof concerning the unreasonableness or unlawfulness of any through route, joint rate, minimum differentials between all-rail rate and joint rate in connection with water service, or division of joint rates shall be upon the carrier or carriers making the complaint; and the Commission shall give the hearing and decision of such questions preference over all other questions pending before it, except such questions as are given like preference by law, and decide the same as speedily as possible: *Provided*, That if the Inland Waterways Corporation sells or leases its transportation facilities to any person, firm, or corporation to be operated as a common carrier, such person, firm, or corporation shall be entitled to a certificate of public convenience and necessity upon making application therefor; and all through-

traffic arrangements and joint tariffs with rules, regulations, and practices in connection therewith published by the Inland Waterways Corporation and filed with the Interstate Commerce Commission and participated in by other carriers shall remain in full force and effect between such carriers and the person, firm, or corporation purchasing or leasing such transportation facilities from the Inland Waterways Corporation and operating the same as common carriers until changed by order of the Commission, except that such through-traffic arrangements and joint tariffs, with rules, regulations, and practices therewith, may be changed by mutual consent of the water carrier and the other participating carriers. Joint rail and water rates as herein used shall be deemed to include every movement of traffic in which a water line can participate.

(f) The operation of the transportation and terminal facilities under this act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were privately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

SECTION 3. The Secretary of War is authorized and directed to cause an investigation and survey to be made of the inland water route from Boston, Massachusetts, to Beaufort, North Carolina, with a view to determining the amount of actual or potential commerce thereon and the feasibility and advisability of extending the service of the Inland Waterways Corporation to the waterways included in such route, or any section thereof, and to report thereon to the Congress as soon as practicable.

Approved, May 29, 1928.

QUESTIONS

1. If private persons are not now willing to carry on the business with which the corporation is charged, why is there any reasonable expectation that they will take it over in the future?

2. Why should Congress forbid the sale or lease of these facilities to rail carriers? Is this consistent with the policy of encouraging consolidation of the railways?

[For a discussion of the power over rates given to the Commission by paragraph (e) of Section 3, see IV, I, 9, a, (1), Part D.]

R. MISCELLANEOUS PROVISIONS OF THE INTERSTATE
COMMERCE ACT

1. ROUTING OF SHIPMENTS

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15, paragraphs 8-10 (I. C. Act, pp. 42-43). Paragraph 8 was introduced into the act by the amendment of June 18, 1910, and paragraphs 9 and 10 by the Transportation Act of 1920.]

QUESTIONS

1. What is the purpose of securing to the shipper the control over routes given by paragraph 8?
2. Under what circumstances might the Commission justifiably interfere with the full control of shippers over routes?
3. Which would benefit more by the enactment of paragraph 9, short lines or trunk lines?
4. Could the Commission give to shippers by express the right to direct the routing of their shipments?
5. When the receiving carrier could carry a shipment through to destination on its own lines, is it not depriving the carrier of property without due process to permit a shipper to choose a different route in part?

2. DISCLOSURE OF INFORMATION AS TO SHIPMENTS

[The pertinent statutory provisions are found in the Interstate Commerce Act, Section 15, paragraphs 11 and 12 (I. C. Act, pp. 43-44). These paragraphs were introduced into the act by the amendment of June 18, 1910.]

INDEX

- Abandonment, regulation of, 500-509
- Accidents, reporting of, 608
- Accounting regulated by Interstate Commerce Commission, 97-105
- Accounting section, valuation work, 139
- Acquisition of control, by Southern Pacific of Central Pacific, 527-537; by Nickel Plate, 537-554; subject to Interstate Commerce Commission, 591
- Adjustment boards, 617, 623-624
- Agriculture, affected by railroad rates, 408; and the Hoch-Smith resolution, 454-456
- Allotment of cars, 487-489
- Allowances by carriers, 462
- Antitrust laws applied to railroads, 519-522
- Appreciation of railroad property, 133
- Arbitration of labor disputes, Act of 1888, 608-609; Erdman Act, 609-610; Newlands Act, 611-616; Railroad Labor Board, 618-620; Railway Labor Act, 622-623
- Ash Pan Act, 593
- Assigned cars, 484-496
- Automatic train-stop devices, 593
- Basic commodities, rate reductions, 355-357
- Basis of rates, 346-347
- Bids for supplies, 568-574
- Bills of lading, export, 624-627
- Blanketing of transcontinental rates, 249-251
- Block Signal Resolution, 593
- Board of Mediation, 621-624
- Boiler Inspection Act, provisions, 593; construed by the courts, 598-603
- Burdens on interstate commerce, 21-23
- By-product traffic, 266-267
- Capital, charges on ore transported, 417, 420-421, 423, 426, 428; structure of Nickel Plate plan, 538-540
- Capitalization of surplus, 185-190
- Car service, 483-496
- Carriers, general duties, 106; attack Commission's orders, 107-114; civil liability, 115-116; liable for damages, 117-118; embezzlement of funds of, 129; supplying drayage service, 457-465
- Central Pacific acquisition, 527-537
- Certificate of Shipping Board, effect on rates, 399-404; binding on Commission, 404-408
- Circuit Courts' duties under Interstate Commerce Act, 87-93
- Circuity of routes, long and short haul provision, 263-267; rail and barge, 321-322
- Circumstances and conditions justifying fourth-section violations, 227-234, 235-243
- Circumstances and conditions justifying preferences, 204-211
- Civil liability of carriers, 115-116
- Classifications, power to prescribe, 287-291; general basis, 430-433; leather, 433-435; lumber, 435-440; percentage relationship of rates, 440-443
- Clayton Act, embezzlement, 129; stock purchase, 527; transactions with firms with same officers, 568-570
- Coal, transported by railroad mining, 577-581
- Commerce, consists of, 1-5; clause of constitution, 2-3; powers of states over, 15-16; interstate, *see* Interstate commerce
- Commission on the Merchant Marine and Fisheries, 399-404
- Commissioner of Mediation and Conciliation, 615-616
- Commissions, state railroad, general powers, 46-53; rate regulation, 54-63
- Commodities clause, 574-582
- Commodity competition, 446, 452-453, 479-483
- Commodity rates, 443-445
- Common law, liability of carrier, 117-118; duty of carrier, 595
- Commutation rates, 377, 391-398
- Compensatory rates, 252-260
- Competition, with water lines and motors, 163-164; justifying preferences, 203-211; long and short principle, 226-234; market, 261, 465-479; motor vehicle, 382; carrier, 394-396; drayage by carriers, 457-465; commodity, 479-483; lessened by pooling, 525; effect of unification, 543-544; steamship lines, 555-564; interlocking directorates, 564-568; consolidation plans, 584
- Competitive bidding for railroad securities, 192-194

638 GOVERNMENT AND RAILROAD TRANSPORTATION

- Compulsory Testimony Act, 82
- Concurrent jurisdiction of state and Federal government, 16-17
- Condemnation value, 161
- Congress, power to regulate telegraph, 4-5; supersedes state action, 16-17; exclusive power to regulate interstate commerce, 17-19; power over interstate commerce, 22-23; regulation of intrastate rates, 25-26; control of quarantine regulations, 29-35; need of railroad regulation by, 69-75; securing testimony, 88-91; control of state corporations in interstate commerce, 104
- Consolidation of railroads, 527, 582-593
- Constitution, commerce clause, 2-3
- Constitutionality, recapture clause, 362-369; assigned car rules, 489; certificate of abandonment, 506; delegation of power to permit common control of rail and water carrier, 563; commodities clause, 575-577; regulation of working hours, 603-606
- Construction, costs related to value, 155; of statutes, 323-324; control of, 500, 508-509
- Constructive year, 354-355, 358-359
- Contingent fund, general railroad, 371-372
- Contribution towards construction of railroads, 141
- Control, of Central Pacific by Southern Pacific, 527-537; by Nickel Plate, 537-555; of one carrier by another, 591
- Corporate history of carriers, 141-142
- Cost of installation, 135
- Cost of service, compensatory rates, 252-260; commutation traffic, 392-394; iron ore transportation, 412-430; lignite coal, 450-451
- Courts, review of Interstate Commerce Commission orders, 107-114; enforcement of Commission orders, 126-127; enjoining of valuation report of commission, 142-147
- Damages from unreasonable rates, 117-118
- Dangerous articles, carriage of, 607-608
- Depreciation, railroad property, 133; functional, 165, 167-169
- Deprivation of property and rate regulation, 62-63
- Differentials, of water lines, 309; effect on port development, 465-479
- Directors, interlocking, 564-568
- Discrimination, Massachusetts legislation, 49; Illinois legislation, 52; cause of Federal regulation, 69, 72-73; personal, 195-199, 374-376; local, 200-219; penalties, 219-223; through not granting through rates, 307-308; caused by intrastate rates, 331-340, 397; issue of mileage tickets, 388; drayage absorption, 463-464; use of assigned cars, 489-490, 491-493; bills of lading, 626
- Distance, factor in rate-making, 111-112
- District Court Jurisdiction Act, 107
- Division of earnings, 522-526
- Divisions of rates, among railroads, 297-306; with barge lines, 307-323
- Docket of Commission, 78-79
- Drayage absorption by carriers, 457-465
- Due process clause, and rate regulation, 62-63; in rate adjustments, 216-217
- Earning power, factor in consolidations, 583-588
- Economic bases of rate-fixing, 411-412
- Economies of joint control, 529
- Efficiency, test of value, 164-165; factor in rate-making, 353
- Elements of value, general, 138; rate-making purposes, 154; to be considered by Commission, 178-181
- Elkins Act, 82, 129, 219, 284
- Ellingwood, A. R., 608-610
- Embezzlement from carriers, 129
- Employee interest in joint operation, 530-531
- Employees, relations with, *see* Labor disputes
- Employees' Liability cases, 604-605
- Engineering inventory, 130-132
- Equipment trust, 190-194
- Erdman Act, 609-610
- Esch Car Service Act, 483
- Evidence, use of Commission's records, 128; considered by Commission, 155-156
- Excess returns, recapture of, 362-369; amounts recaptured, 370
- Exchange of services, 281-282
- Exclusive right to navigate, 1-3
- Expediting Act, 107, 129
- Explosives, transportation, 607-608
- Export rates on American vessels, 399-404
- Facilities, regulation of, 483-519
- Fact, Commission final on questions of, 277
- Fair return, on railroad property, 158-159; standard of reasonableness, 367; failure to earn, 384
- False billing, 284-287
- Federal power, exclusive over interstate commerce, 17-19
- Federal regulation, supersedes state, 27-35; economic and political causes, 67-69; need for, 69-75
- Final value, method of ascertaining, 142-147
- Financial basis of consolidation, 584-588
- Foreign commerce, regulation of carriers, 624-627

Fourth-section relief, *see* Long and short haul
 Fraud, state regulation, 37
 Free transportation, 373-377
 Functional deterioration, 165

Geographic location, advantages, 468
 Granger movement, 47, 53

Hearings not required in joint-rate applications, 326-330
 Hepburn Act, 287
 Hoch-Smith resolution, investigation, 408-411; applied to specific cases, 454-456

Hours of Service Act, provisions, 603; construed, 603-607

Illinois Railroad Commission, 48, 50-53
 Immunity of Witnesses Act, 82

Import rates, lower than domestic, 200-211; American vessels, 399-404

Income, limitation on carrier, 365-366
 Information as to shipments, 636

Inland waterways, through routes, 323-330; corporation legislation, 628-635

Interchangeable mileage ticket investigation, 381-390

Interlocking directorates, 564-568
 Interstate bridge, state tolls, 15-19

Interstate commerce, regulated by state tax, 6, 10-13; defined by Interstate Commerce Act, 13-14; Federal power exclusive, 15-19; state prohibition of sales, 35-45; and state rate regulation, 61-62

Interstate Commerce Act, interstate commerce defined, 13; composition of Commission, 76; jurisdiction and procedure of Commission, 77; reports and orders of Commission, 78; obtaining testimony, 82; accounting reports, 96-97; general duties of carriers, 106; civil liability of carriers, 115-116; liability for unreasonable rates, 117-123; penalties for general violations, 125-126; mandamus to compel compliance, 126; enforcement of orders, 126-127; statute of limitations, 128; Commission reports as evidence, 128; parties to proceedings under, 129; valuation provisions, 129; value for rate-making, 149; issue of new securities, 182; discriminations prohibited, 195; penalties for discriminations, 219-220; long and short haul (1887), 224; long and short haul under Mann-Elkins Act, 234; long and short haul in act of 1920, 244; just and reasonable rates, 268; publicity of rates, 282; stability of rates, 283-284; observance of rates, 284-285; maximum rates and classification, 287-291; suspension of rates, 291; rail and

water rates, 292; rates under the Transportation Act, 297-298; rates imposed by state authority, 331; rate basis, 346-347; recapture clauses, 362; reserve fund, 371; contingent fund, 371; transportation free or at reduced rates, 373; mileage, excursion and commutation rates, 377; car service, 483-484; use of terminals, 496; construction or abandonment, 500; connection with water carriers, 509; switch connections, 514; pooling (1887), 520; pooling (1920), 522; purchase of stock or leasing, 527; competing steamship lines, 555; interlocking directorates, 564; commodities clause, 574; consolidation provisions, 582; train-stop devices, 593; water carriers in foreign commerce, 624; routing of shipments, 636; disclosure of information as to shipments, 636

Interstate Commerce Commission, composition, 76; jurisdiction and procedure, 77; reports and orders, 78-81; power to obtain testimony, 82-96; accounting regulation, 96-105; rate-making orders, 107-114; gives primary redress for unreasonable rates, 118-123; enforcement of orders, 126-127; records as evidence, 128; valuation reports, 142-147; evidence in valuation cases, 155-156; weighting of elements of value, 173-181; regulates issue of securities, 182-194; removing discriminations, 203-211, 213-214; long and short haul provision (1887), 229-234; Mann-Elkins Act long and short haul provisions, 234-243; no power to fix rates (1887), 268-275; power to determine reasonable rates, 275-278; to prescribe maximum rates and reasonable classifications, 287-291; to suspend rates, 291-292; control of joint rail and water rates, 292-297; minimum rates, 297-298; divisions of joint rates, 297-306; joint rail and water rates set without hearing, 307-323; joint rail and water routes, 324-330; control over state rates, 331-340; prohibition of reduced rates, 374-377; directed to order issuance of mileage tickets, 378-381; compelled to lower rates on imports and exports, 399-404; switch connections, 415-419; assigned cars, 489-490; abandonment authorized by, 500-509; connections with water carriers, 511-513; stock purchase or leasing, 527-555; competing steamship services, 555-564; interlocking directorates, 564-568; to adopt consolidation plan, 582; proposes changes in consolidation provisions, 591-593; locomotive equipment requirements,

640 GOVERNMENT AND RAILROAD TRANSPORTATION

- 599-603; power to require reports, 606
- Interstate Commerce Commission, annual reports: 36th, 566-568; 38th, 124-125; 39th, 341-346, 591-592; 41st, 78-80, 346; 42d, 286, 370, 371-372, 408, 411
- Intrastate commerce, not regulated by requiring reports, 103; rates discriminate against interstate commerce, 397; abandonment of traffic in, 501-505
- Inventory of carriers, 130-132
- Investigation, rate structure, 408-411; railroad labor disputes, 608-609
- Investment value, 173-174
- Iron ore transportation costs, 412-430
- Issuance of securities, 182-194, 552
- Joint action, state and Federal commissions, 340-346
- Joint control, economies, 529
- Joint rates, with water carriers, 99-100; division of, 298-306; with barge lines, 307-323; inland waterways, 323-330
- Joint service, 522-526
- Labor Act of 1888, 608-609
- Labor disputes, act of 1888, 608-609; Erdman Act, 609-610; Newlands Act, 610-616; Railroad Labor Board, 616-620; Railway Labor Act, 620-624
- Land grants, valuation, 141
- Land values, ascertaining, 136-138
- Leasing of one railroad by another, 527-555
- Leather, classification, 433-435
- Liability of carriers, civil, 115-116; unreasonable rates, 117-118; released rates, 124-125
- Lignite coal rates, 445-454
- Limitations, statute of, 128
- Loading factors in classification, 439-440
- Local discriminations, 200-211
- Local utilities, 169-172
- Long and short haul, early Massachusetts legislation, 49; act of 1887, 224; effect of competition, 224-234; Mann-Elkins Act, 234; act of 1920, 244; circuitous routes, 263-267
- Lumber, rates affecting, 108-114; basis of classification, 435-440
- Mandamus proceedings, 126
- Mann-Elkins Act, 234
- Market competition, 261, 465-479
- Massachusetts railroad commission, 47-50
- Mediation in railroad labor disputes, Erdman Act, 609-610; Newlands Act, 611, 615-616; Railway Labor Act, 622-623
- Merchant Marine Act, 292, 399
- Mileage tickets, 377-381
- Minimum rates, 297-298
- Minority stockholders, protection, 544-554
- Mississippi railroad commission, 54-63
- Mississippi River service, 633-634
- Mississippi-Warrior Service, rates to the Gulf, 247; division of rates, 307-323
- Money pools, 521
- Monopolistic tendency, 519-520
- Monopoly effect on value, 169-172
- Navigation, power to control, 1-3
- New England rates, 298-306
- Newlands Act, provisions, 610-615; experience under, 615-616
- New York railroad commission, 46, 48
- Nickel Plate merger, 537-554
- Notice of rate changes, 283-284
- Obligation of contract, 56-60
- Observance of rates, 284-287
- Occupation tax as regulation of commerce, 6-10
- Ocean competition, 203-211
- Open terminals, 498-499
- Operating costs, effect of additional traffic, 255-260; ore transportation, 417-429
- Orders of the Commission, 126-127; *see also* Interstate Commerce Commission
- Original cost, use in valuation, 139-141
- Original package doctrine, 8-9, 40-43
- Out-of-pocket cost, 435, 455
- Overhead charges of construction, 135-136
- Panama Canal, effect on rail rates, 245-251; railroad-owned steamships excluded from, 555, 559-560
- Panama Canal Act, 292, 555-556
- Penalties, general violations of Interstate Commerce Act, 125-126; discriminations, 219-223
- Physical pools, 521
- Police power, regulation of trade, 16; limitations on state exercise, 26-29; and Federal statutes, 600-603
- Pool revenue, 524-525
- Pooling, act of 1887, 520-521; act of 1920, 522; joint passenger service, 522-526
- Preference, local, 200-219; fourth-section exceptions, 260-262; *see also* Discrimination
- Preferential treatment of classes of shippers, 374-377
- Preferred stock, nonvoting, 548-550
- Present cost, essential of value, 151-153; element of value, 156-162
- Price level, influenced valuation provisions, 160
- Prices, applied to valuation inventory, 133-135

- Private cars, 484-496
 Proceedings under Interstate Commerce Acts, parties to, 129
 Profits of industry, factor in rate-making, 112-114
 Prohibition of sale within state, 35-45
 Prudent investment in valuation, 173-174
 Publicity of rates, 282-283
 Purchase of stock of one railroad by another, 527-555
 Quarantine regulations, limits on state power, 27-35
 Railroad Labor Board, statutory provisions, 616-620; action by, 620
 Railway Labor Act, provisions, 620-621; work of board, 621-624
 Rate base, effect of fluctuations, 160
 Rate changes, effect on traffic, 162-163
 Rate of fair return, 348-351
 Rate regulation, Illinois railroad commission, 50-53; difficulties of state, 64-66; *see also* Interstate Commerce Act and Rates
 Rate structure investigation, 408-411
 Rate-making, distance factor, 111-112; valuation for, 149-181; unjust discrimination, 267; just and reasonable, 268; standards of reasonableness, 278-281; under Transportation Act, 297-298; fair return, 346-361
 Rates, state power, 19-27; early Massachusetts legislation, 49; state commissions, 54-63; company-owned railroad, 84-86; power of Commission over, 107-114; released, 124-125; publicity of, 282-283; stability, 283-284; observance, 284-287; power to prescribe maximum, 287-291; suspension, 291-292; control of rail and water, 292-297; divided with barge lines, 307-323; control over intrastate, 331-340; on exports and imports, 399-408; economic basis, 411-412; cost-of-service principle, 412-430; value-of-service principle, 430-457; graded by classification, 441; ability to bear, 445-454; agricultural products and Hoch-Smith resolution, 454-456; *see also* Interstate Commerce Act
 Reasonable rates, evidence, 108-114; under act of 1887, 268-275; by whom determined, 275-278; standards of, 278-281
 Reasonable wages, 619
 Rebates, prohibited, 195-199; to shippers, 463-464
 Recapture clauses, and valuation, 149-153; provisions and meaning, 362-369; excess income recovered, 370
 Recapture and rate-making values, 172-173
 Recipient of preferences penalized, 221-223
 Reduced rates, effects on commodities, 355-357; transportation at, 373-377; effects on revenues, 389-390
 Refusal to testify, 86-96
 Regulation, state legislation prior to 1886, 46-53
 Relative rates on commodities, 479-483
 Released rates, 124-125
 Reports, required from carriers, 100-101; of accidents, 608
 Reports of Commission, legal requirements, 80-81; evidence in controversies, 144-145; *see also* Interstate Commerce Commission, annual reports
 Reproduction cost, essential of value, 151-153; element of value, 156-162; affected by obsolete plant, 165; weight in valuation, 179-181
 Reserve fund, 371
 Return, on railroad property, 158-159; affected by intrastate rates, 335-338; rate basis, 346-361
 Routes, consolidation to preserve existing, 584
 Rules of practice of Interstate Commerce Commission, 77
 Safety Appliance Acts, provision, 593; construed, 593-598
 Safety and health regulations, 593-608
 Sale of railroad securities, 192-194
 Securities, issue of, 182-194
 Senate Select Committee on Interstate Commerce, 46-53, 64-65, 67-75
 Separation of Southern Pacific and Central Pacific, 532-534
 Services, exchange of, 281-282
 Sherman Act, 527-528
 Shippers, appeal to Commission, 118-123; control of routing, 636
 Short hauling, 498
 Shortened procedure of Commission, 79-80
 Smyth *v.* Ames, valuation rule, 151
 Southern Pacific application to acquire Central Pacific, 527-537
 Southwestern Bell Telephone case, valuation rule, 151, 155
 Stability of rates, 283-284
 State commissions, power to regulate rates, 54-63; cooperation with Interstate Commerce Commission, 340-346
 State corporations in interstate commerce, 104
 State power, over right to navigate, 1-3; to regulate telegraph, 4-5; to lay import duties lacking, 6-10; to tax interstate commerce, 6-13; prohibition of sale of imported goods, 10-11; over internal commerce, 15-16; incidentally to regulate interstate commerce, 16-17; exercised prior to that

642 GOVERNMENT AND RAILROAD TRANSPORTATION

- of Federal government, 19-27; to establish quarantine, 27-35; exclusive regulation of commerce, 35-45; not sufficient for railroad regulation, 73; and recapture clauses, 368; to file complaint with Commission, 511
- State rates, subject to Commission, 331-340; coöperation of Federal and state authorities, 340-346
- State regulation, prior to 1886, 46-53; difficulties, 64-66; affecting Commission's power, 516-518
- State safety provisions superseded by Federal, 598-603
- Statute of limitations, 128
- Steamship lines, railroad operation, 555-564
- Stock dividend, 183-190
- Stock purchase by railroads, 527-555
- Stockholders, interests of minority, 544-554; public responsibility, 552
- Subsidiaries, unprofitable, 552
- Surplus of carrier, 185-190
- Switch connections, with water carriers, 509-514; with shippers in general, 514-519
- System cars, 484
- Taxing power of state, 6-12
- Technological advances affect valuation, 166-167
- Telegraph, power to regulate, 4-5
- Terminal costs, 414, 415-416
- Terminals, use of, 496-500; factor in consolidation, 589
- Testimony, power to obtain, 83-96; required in rate-making cases, 109-110
- Through rates, inland waterways, 323-330
- Traffic, effect on value, 165-166
- Transactions with firms with same officers, 568-574
- Transportation, free or at reduced rates, 373-377; of Explosives Act, 607
- Trustee, carrier acts as, 367-368
- Undue preference, 209-211, 214-217, 231
- Unification, Southern Pacific, 527-537; Nickel Plate, 537-555; advantages to public, 541-543
- Uniform accounts, 101-105
- Uniform regulation of railroads, 73
- Unreasonable rates, liability of carrier, 117-118; adjusted by Commission, 118-123
- Valuation, ascertainment of general value, 129-142; power of Commission to issue order, 142-147; for rate-making purposes, 149-181, 351-352; related to cost of service, 423, 425-426
- Value, of land ascertained, 136-138; of service, 430-457; factor in classification, 436
- Violation of Interstate Commerce Act, penalties, 125-126
- Voting power, concentration, 547-550
- Wage standards, 619
- Warrior River, 633-634
- Water carriers, subject to Interstate Commerce Act, 99-100; joint rates, 307-317, 321-323; division of rates, 317-321; connection with, 509-514; regulation, 624-627
- Water competition, long and short haul principle, 227, 244-251
- Water and rail rates, 292-297
- Water and rail routes, railroad operation, 560-564
- Waterways Corporation, 628-635
- Watkins, Edgar, 278-280
- Weak roads, consolidation, 582-583, 586-588
- Wholesale transactions in transportation, 385-387
- Witnesses, power to require testimony, 82-96
- Working hours of employees, 603-607



Date Due

LIBRARY

JUN - 9 1930

**SOUTH DAKOTA
STATE COLLEGE**

